Supreme Court, U.S.
FILED

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No. ___ ____

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IN THE
Supreme Court of the United States

October Term, 1993

LUMMI INDIAN TRIBE,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OFFICE OF THE
RESERVATION
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April 28, 1994

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QUESTIONS PRESENTED FOR REVIEW

1. Is Tribally owned fee land located on the Lummi Indian Reservation subject to State real estate taxation without an express Congressional grant of such jurisdiction?

2. Does 25 U.S.C. §177, which \restricts the alienation of any land owned by an Indian Tribe, apply to Reservation land which has been assigned to an individual Tribal member, subsequently sold to a non-Indian, and then acquired by the Tribe itself?

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LUMMI INDIAN TRIBE,

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WHATCOM COUNTY, WASHINGTON;
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REFERENCE TO THE REPORTS OF OPINIONS BELOW

Petitioner, Lummi Indian Tribe prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reentered

April 19, 1994, which affirmed the judgment of the U.S. District Court for the Western District of Washington at Seattle. The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993). See Appendix B. The decision of the United States District Court for the Western District is not reported. See Appendix A.

STATEMENT OF JURISDICTION

The order and decision on which review is sought was entered December 23, 1993, and reentered on April 19, 1994. The order included amendments made pursuant to petitioner's request for rehearing. Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. §1254(1).

TREATIES AND STATUTES INVOLVED

This case involves the Article 7 of Treaty of Point Elliott, 12 Stat. 927 (1859) and Article 6 of the Treaty with the Omahas, 10 Stat. 1043 (1854). Both are reproduced in Appendix C to this Petition.

The following statutes are also involved: 25 U.S.C. §177; 25 U.S.C. §331; 25 U.S.C. §348; 25 U.S.C. §349; 25 U.S.C. §372. The statutes are also reproduced in Appendix C.

STATEMENT OF THE CASE

This case presents the "prior legal question" specifically left open in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ____, 116 L.Ed.2d 687 (1992): Whether the alienability

of tribally owned reservation lands is sufficient, by itself, to subject those lands to state taxing jurisdiction absent an unmistakably clear Congressional grant of such jurisdiction.

By a two to one decision, the Court of Appeals for the Ninth Circuit held that "alienable land is taxable land" even as it acknowledged that "[t]his proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1357 (9th Cir. 1993).

The Petition for Certiorari should be granted to resolve the conflict between this Court's frequently articulated stringent standard for determining state taxing jurisdiction of Reservation property, *see*, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. ____, 124 L.Ed.2d 30, 43 (1993); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and the contrary result below which the majority opinion found to be a "virtually inescapable ... conclusion" from the "strength of the language in *Yakima Nation*." 5 F.3d at 1357. The Ninth Circuit's interpretation of *Yakima Nation* is inconsistent with the actual holdings in that case and with settled principles of Federal Indian law.

A subsidiary question is whether the restraint on alienation of Tribal lands imposed by 25 U.S.C. §177 applies to Reservation lands reacquired by a Tribe after a period of non-Indian ownership, and if so, whether that restraint on alienation precludes state taxation.

ARGUMENT

I. THE LUMMI PARCELS WERE TREATY ASSIGNMENTS, NOT GENERAL ALLOTMENT ACT ALLOTMENTS

In *Yakima Nation*, the Court held that Washington's ad valorem property tax could be imposed on Indian owned Reservation fee lands allotted under the Indian General Allotment Act of 1887 (25 U.S.C. §§331 et seq.), but that Washington's real estate excise tax could not be imposed on the sale of such lands. The distinction between the two taxes lay in the Court's finding that Congress had given clear and unmistakable consent to the taxation of the land through the enactment and amendment of the General Allotment Act, but that such consent was lacking where the excise tax was concerned. 502 U.S. ____, 116 L.Ed.2d at 705.

The *Yakima Nation* decision dealt extensively with the history and structure of the General Allotment Act. At the close of the decision, the Court specifically left open the Yakima Nation's factual contention that certain parcels at issue in the case were patented under statutes other than the General Allotment Act, as well as the "prior legal question whether it makes any difference." 502 U.S. ____, 116 L.Ed.2d at 705. This case addresses that legal question.

The factual history of the Lummi parcels is not in dispute. As the Ninth Circuit noted:

> The Lummi Indian Reservation was created in 1855 by the Treaty of Point Elliott, a compact between the United States and numerous tribes and bands of Indians in northern Puget Sound.

Under the terms of the Treaty, the Lummi ceded all rights to a significant section of Western Washington, in return for exclusive use of reservation lands. The Treaty also authorized the subdivision of the Reservation into parcels which could be assigned or allotted to individuals or families.

In 1884 the government carried out the treaty terms, dividing 10,500 acres of the Reservation into 72 assignments or allotments and issuing fee patents, subject to restrictions on alienation and exempt from levy, sale and forfeiture. The taxability of four parcels, all now owned by the Tribe in fee patent status, is at issue in this case.

The first parcel is a portion of an original assignment made to Lewis Kichowilton. After his death, Kichowilton's heirs divided his allotment among themselves, with the parcel at issue deeded to Mary George, a member of the Tribe. Upon George's death, Irene Miller, a Canadian Indian, inherited the land. Because the United States had no supervisory responsibility over Miller, the Bureau of Indian Affairs issued an "Order Removing Restrictions," allowing Miller to alienate the parcel. In the 1970s the Tribe purchased it from a non-Indian owner.

The three other parcels were originally assigned to John A. Jones. In 1916, after determining that Jones was "fully competent and capable of transacting his own business," the Secretary of the Interior issued him a "Certificate of Competency." *See*, 25 U.S.C. §372 (1988). It removed any restriction on Jones' ability to alienate the land.

> The Tribe purchased these parcels in the early 1980's.

Lummi Indian Tribe v. Whatcom County, 5 F.3d at 1356-57.

Obviously, the Indian General Allotment Act of 1887 was not involved in the allotment of these parcels, since that statute was not passed until three years *after* the assignments were made under the Treaty provisions. In addition, the title which the Treaty assignees received was a restricted fee patent, while the General Allotment Act allotees received 25 year trust patents. *See*, 25 U.S.C. §348. Likewise, §6 of the General Allotment Act (25 U.S.C. §349), which provides for the eventual patenting in fee of General Allotment Act allotments, specifically provides for the removal of "all restrictions as to .... taxation of said land." No similar language exists in 25 U.S.C. §372, the statute used to allow alienation of the Treaty assigned lands on the Lummi Reservation.

Thus, the question of taxability of the Lummi parcels is not controlled by the General Allotment Act, but rather by the treaty and statutory provisions actually used to assign and alienate the land. This is the issue left open in *Yakima Nation*.

Contrary to this Court's requirements in Indian taxation cases, the Ninth Circuit did not examine the differences between the General Allotment Act and the Treaty assignments, nor did it examine the history and structure of the statute utilized to remove the restraints on alienation. Rather, it held that this Court's decision in *Yakima Nation* decided the very question which the Court had specifically declined to rule upon.

The Ninth Circuit's ruling violates this Court's often stated and recently repeated method of analysis in Indian taxation cases.

II. RESERVATION PROPERTY IS NOT SUBJECT TO STATE TAXATION IN THE ABSENCE OF AN UNMISTAKABLY CLEAR GRANT OF TAXING JURISDICTION

The Court has frequently stated the standard for assessing state taxing jurisdiction on an Indian Reservation:

> In the special area of state taxation of Indian Tribes and Tribal members, we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interest in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated:
>
> > In keeping with its plenary authority over Indian affairs, Congress *can* authorize the imposition of state taxes on Indian Tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians exemption from state taxes lifted only when Congress has made its intention to do so *unmistakably clear*. *Id.* at 765. We have repeatedly addressed the issue of state taxation of Tribes and Tribal members and the state, federal and Tribal interest which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the

> state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, n. 17 (1987) (emphasis added).

As recently as 1993 the Court unanimously reaffirmed these basic principles and applied them even to an "informal" reservation:

> Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. ____, 124 L.Ed.2d 30, 43 (1993).

III. CONTRARY TO THE NINTH CIRCUIT HOLDING, THE YAKIMA NATION COURT APPLIED THE BASIC PRINCIPLES BUT FOUND AN EXPRESS GRANT OF JURISDICTION

Yakima Nation dealt with an express grant of taxing jurisdiction which made explicit the *implied* grant of taxing jurisdiction which the Court said arose from the free alienability of the land. 502 U.S. ____, 116 L.Ed.2d 701. The Court did not hold that an implied grant, standing alone, satisfied the jurisdictional test.

Indeed, the Court again required a finding that Congress had clearly ceded jurisdiction to the state:

> "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987).

Yakima Nation, 502 U.S. ____, 116 L.Ed.2d 687, 697-98.

The cession language relied upon by the Court to satisfy this test was the Burke Act, a 1906 amendment to §6 of the General Allotment Act (codified at 25 U.S.C. §349). It expressly provided for removal of "all restrictions as to sale, incumbrance or taxation of said land" upon the issuance of a fee patent under the General Allotment Act.

Two factors indicate that this direct reference to taxation was necessary to satisfy the express grant test. First, if the removal of restrictions on sale was itself sufficient to subject the land to taxation, Congress would not have found it necessary to include an express removal of "restrictions as to . . . taxation," as well as the removal of "restrictions as to sale."

Any other construction "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some appropriate effect."

United States v. Nordic Village Incorporated, 503 U.S. ____, 117 L.Ed.2d 181, 189 (1992); *Reiter v. Sonotone Corporation*, 442 U.S. 330, 338-39 (1979).

This Court recognized the general distinction between the restraint on alienation and the tax exemption in a case decided shortly after the Burke Act was passed:

> [T]he exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation ... . The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

Choate v. Trapp, 244 U.S. 665, 673 (1912) (citations omitted).

Second, the *Yakima Nation* Court itself focused and relied upon the language of the Burke Act proviso to distinguish between the ad valorem real estate tax and the real estate excise tax. Noting that the proviso specifically referred to "taxation of said land," the Court upheld the ad valorem tax. However, the excise tax was imposed on the sale of the land, and the Court found that tax was not authorized by the statute. The Court held:

> It does not exceed the bounds of permissible construction to interpret "taxation of land" as

> including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with *Goudy's* emphasis upon the consequences of alienability, which underlay the Burke Act proviso. That is surely not, however, the phrase's unambiguous meaning. ... When we are faced with these two possible constructions, our choice between them must be dictated by a principle deep rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit". *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766.

Yakima Nation, 502 U.S. ____, 116 L.Ed.2d 704.

If there was any doubt that the *Yakima Nation* Court was relying upon an explicit grant of taxing authority, that doubt was dispelled when the Court summarized its opinion:

> The short of the matter is that the General Allotment Act *explicitly authorizes* only "taxation of ... land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is imminently reasonable to interpret the broad language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

502 U.S. ____, 116 L.Ed.2d 705 (emphasis added).

If the "emphasis on the consequences of alienability" in *Goudy v. Meath*, 203 U.S. 146 (1906) were sufficient, by itself, to subject the land to taxation, then surely that emphasis would have been sufficient to subject to taxation the freely alienable proceeds of the sale of the land. The Court would have had no occasion to consider whether the Burke Act proviso was ambiguous in relation to the real estate excise tax if the proviso were not a necessary component of the Court's answer to the prior question: Did Congress evidence an unmistakably clear intent to allow taxation of the land itself?

The Court held "[t]he Burke Act proviso, enacted in 1906, made (the) implication of §5 explicit, and its nature more clear." 502 U.S. ____, 116 L.Ed.2d 701. Without the additional clarity of the explicit removal of restrictions on taxation, the mere implication arising from the alienability of the land was an insufficient basis for taxing jurisdiction.

Numerous examples exist of freely alienable Indian property exempt from State taxation because it is located on a reservation. For example, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (mobile home, personal property, located on a Reservation); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) (gross receipts tax on store located on Reservation); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) (income earned by Tribal member resident on a Reservation); *Central Machinery Company v. Arizona State Tax Commission*, 447 U.S. 134 (1990) (purchase of personal property exempt from state sales tax); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Indian owned automobiles exempt from state motor vehicle excise tax); *Washington v. Confederated*

Tribes of Colville Reservation, 447 U.S. 134 (1980) (Indian purchasers exempt from State cigarette and tobacco taxes).

In none of these cases was the fact of alienability of the property considered significant or determinative by the Court. Rather the location of the property on the reservation and the status of the owner as an Indian or Indian tribe controlled the outcome.

This conclusion is consistent with *Goudy*. Although *Goudy* may have placed "emphasis" on alienability, the case did not rest on that ground alone. The underlying facts in *Goudy* clearly demonstrate the doctrinal basis for the decision. Those facts do not all appear in this Court's decision. The case was submitted on an agreed statement of facts, which is referred to in the Court's decision, 203 U.S. at 146, but set out in full in the Washington State Supreme Court decision, 38 Wash. 126, 127 (1905). The crucial fact, and the one which distinguishes *Goudy* from all other Indian taxation cases, is that although Mr. Goudy is described as an Indian, it was also stipulated that he "was formerly a member of the Puyallup Tribe" who, at the time he brought the case, had "entirely severed his Tribal relation."

Therefore, in the eyes of the law, Mr. Goudy was no longer considered to have the status of an Indian, even though he was ethnically an Indian. Consequently, one of the crucial elements necessary for the tax exemption was missing. The land still had a Reservation situs, but the owner did not have the status of an Indian because he had severed his Tribal relations. Viewed from this perspective *Goudy* stands for nothing more surprising than the fact that a person who is not a Tribal

member may not claim tax exemptions available only to Tribal members.

This also explains the *Goudy* Court's emphasis on alienability. Congress unquestionably had the power to restrict the alienability of a tribal member's property. As *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) and *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867) make clear, the Indians' tax exemption was not based on the restricted status of the land. Rather the fact that the land was owned by an Indian and located on a reservation was determinative. The restraint on alienation provided a *second* basis for exemption since if the land could not be involuntarily sold, it could not be taxed.

Conceptually, the restraint on alienation could survive both the termination of the reservation and the severing of tribal relations. If either of these events occurred, the restraint on alienation would still provide a separate argument for exemption from state taxation.

Thus, a former tribal member could own land restricted against alienation. When the restraint on alienation was lifted, however, there would be no independent basis for the tax exemption because the owner could not claim exemptions related to Indian status.

This was precisely Mr. Goudy's situation. He had severed his tribal relations and the restraint on alienation had been removed. Instead of "presuming against a State's having the jurisdiction to tax", *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. ____, 124 L.Ed.2d 43, 113 S. Ct. 1985, 1993, as it would in an Indian taxation case, the Court placed the burden on

Goudy to demonstrate the existence of an express exemption, as it would in a typical non-Indian taxation case. 203 U.S. at 149. Cf. *McClanahan*, 411 U.S. at 176, and *Sac and Fox*, 508 U.S. ____, 124 L.Ed. 2d at 40.

Finding that "it would seem strange" for Congress to silently preserve a tax exemption while explicitly removing the restraint on alienation which was the sole remaining basis for the tax exemption, the Court concluded that Goudy's land was taxable. The Court immediately reinforced this conclusion by noting that Mr. Goudy was fully subject to all of the laws of the state, including its tax laws. 203 U.S. at 149. Thus, only the restraint on alienation stood between Mr. Goudy and the state's ability to tax his land. When that restraint was removed, Goudy's land became taxable. But the result would have been different if a tribal member owned the land and it was located on a reservation.

In conclusion, this Court's decision in *Yakima Nation* did not hold that alienable Tribal property is per se taxable by the State. The Ninth Circuit has read too much into the Court's decision and paid too little attention to the statutes involved, the lack of express grants of jurisdiction, and the long tradition of exempting Tribal property from state taxation in the absence of clear Congressional consent. The Writ of Certiorari should issue to review the decision of the Ninth Circuit and to eliminate any potential confusion caused by that Court's interpretation of the *Yakima Nation* decision.

IV. A SEPARATE RESTRAINT ON ALIENATION IS IMPOSED BY 25 U.S.C. §177

The Ninth Circuit held that Tribal fee lands acquired from non-Indians on the Reservation were not

restricted as to alienation by the provisions of 25 U.S.C. §177. This holding conflicts with decisions of the Tenth Circuit in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957) and *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993). Certiorari should be granted to resolve this conflict.

The provisions of 25 U.S.C. §177 are clear and unambiguous. It voids any "purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian Nation or Tribe of Indians ..." unless specifically authorized by Treaty or federal statutory provisions. The statute makes no distinction as to the source of the Tribe's title. By its terms, it applies to *any* conveyance of *any* Tribal lands.

A statute clear on its face must be applied by the Courts as written. "In a statutory construction case, the beginning point must be language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Howitt v. Nicklos Drilling Company*, ____ U.S. ____ 120 L.Ed.2d 379, 388 (1992).

This Court has consistently applied §177 to all tribal lands. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court held that the source of Indian title was irrelevant to the application of §177. The lands in question were owned by an Indian Pueblo and title was traceable to Spanish or Mexican grants which preceded the inclusion of New Mexico in the United States. *Sandoval* was followed by *United States v. Candelaria*, 271 U.S. 432 (1926) in which the Court specifically applied §177 to enjoin state taxation, holding that the Tribal

lands "cannot be alienated in any wise" without Congressional consent. 271 U.S. at 443.

The lower courts have consistently followed these rulings. In *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), the Tenth Circuit held that fee lands acquired by a Pueblo through purchase in 1936 and 1939 were subject to the restrictions on alienation imposed by §177. The Tenth Circuit recently reaffirmed its holding in *Alonzo* in *Buzzard v. Oklahoma Tax Commission* where the Court applied the statute even to recently acquired fee lands located outside of a Reservation. The commentators also agree:

> Even land held by a tribe in fee simple is subject to the statutory restraints against alienation ... Another consequence of the restraints on alienation is the inability of states to transfer title by foreclosure sale ... or the nonpayment of taxes.

F. Cohen, *Handbook of Federal Indian Law* (1982 ed. p. 520) (footnotes omitted).

The Ninth Circuit decision in the present case is the only authority to the contrary. The majority opinion reasoned that "[n]o court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable." 5 F.3d at 1359. This reasoning suffers from two fatal defects. First, the restraints on alienation are personal to the owner of the land. They do not contemplate a future owner. The fact that the federal government, exercising its supervisory role over the affairs of one particular Indian, removes a restraint on that individual's ability to alienate the property, does not mean that a

subsequent owner may not be restrained in *its* ability to alienate the property.

Second, in the case of a tribal owner, the restraint is imposed by the clear wording of §177, which declares that "*no* ... conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity ... ." The restraint imposed on the individual's ability to sell the land has an entirely different source, and there is nothing to indicate that allotted lands would be exempt from the provisions of §177 if they were subsequently acquired by a tribe.

Neither of the cases relied upon by the Ninth Circuit so holds. Both *South Carolina v. Catawaba Indian Tribe, Inc.*, 476 U.S. 498 (1986) and *Larkin v. Paugh*, 276 U.S. 431 (1928) dealt with the effect of termination of federal supervision over the land owner. They did not deal with subsequent acquisition of the land by a tribe subject to the provisions of §177.

The Ninth Circuit decision is clearly at odds with controlling decisions from this Court and in conflict with a consistent line of decisions from the Tenth Circuit. Certiorari should be granted to resolve this conflict.

CONCLUSION

Indian Reservation lands have always received the highest order of protection from state jurisdiction, especially taxing jurisdiction. If the Ninth Circuit's decision in this case is allowed to stand, Indian land will receive less protection than any other Indian property. The decision is based on a vague implication said to arise from the free alienability of the land, even though this Court has consistently required an unmistakably

clear Congressional grant of jurisdiction to the States before allowing them to tax Indian reservation property. When the controlling precedents are properly understood in their factual contexts, it is obvious that the decision is fundamentally in error. In addition, the Ninth Circuit incorrectly held that 25 U.S.C. §177 does not apply to tribal fee lands. This decision is in direct conflict with the Tenth Circuit and with this Court's decisions. The Writ of Certiorari should issue to correct these errors.

Respectfully submitted this 28th day of April, 1994.

OFFICE OF THE RESERVATION ATTORNEY

Harry L. Johnsen III
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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUMMI INDIAN TRIBE, Plaintiff, v. WHATCOM COUNTY, et al., Defendants.	Case No. C89-696W **ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS**

The parties have filed cross-motions for summary judgment. There are no genuine issues as to material facts. For the reasons set forth below, defendants' motion is GRANTED; and plaintiff's motion is DENIED.

Defendants' motion for order of joinder of the State of Washington as defendant or in the alternative for dismissal is DENIED.

The basic issue is whether land within the Lummi Reservation and held in fee patent by the Lummi Tribe is subject to taxation by the State of Washington.

Since this case was filed, the U.S. Court of Appeals for the Ninth Circuit has decided a similar case which is dispositive of this issue: *Confederated Tribes and Bands of the Yakima Nation v. Yakima County*, et al, 893 F. 2d 1044 (9th Cir. 1990). In *Yakima*, the lands in question were all within the Yakima Reservation. Most were owned by individual members of the tribe; but some of the land was owned by the tribe itself. The court treated both categories of land identically, holding both subject to state real estate taxes. Such land is exempt from state taxation, the court held, unless Congress makes unmistakably clear its intention that the exemption be lifted. But the court held that Congress did so in the General Allotment Act, 25 U.S.C. §349. That section specifically provides that, once a patent in fee simple has been issued to an Indian, all restrictions as to taxation of said land shall be removed.

In attempting to distinguish *Yakima*, plaintiff argues that the provisions of §349 apply only to land for which the fee patent was issued pursuant to the procedures of the General Allotment Act. The Lummi Tribe, however, obtained fee patent to some or all of the land involved in this case by virtue of treaty, and not the General Allotment Act. The General Allotment Act provides for allotment of lands to individual tribal members, not to the tribes themselves.

This attempt to distinguish *Yakima* is not persuasive, because the ruling in that case was not limited to land obtained pursuant to the General Allotment Act. The District Court had prohibited Yakima County from taxing *both* the fee patent land of the Yakima Nation *and* that of its members ("Order" of Judge McDonald, 5/10/88, at p. 7). On appeal, the Ninth Circuit noted that there was land in each category,

but reversed in all respects. Although the land held by the Yakima Nation had not been obtained under the General Allotment Act, the court nevertheless held it was subject to state taxation. Thus, the fact that the land was held in fee patent status seemed to be determinative, without regard to whether it was issued pursuant to the General Allotment Act or otherwise.

Goudy v. Meath, 203 U.S. 146, 27 S. Ct. 48, 51 L. Ed. 130 (1906) lends further support to this conclusion. In *Goudy*, the Supreme Court held that fee patent land held by a Puyallup Indian was subject to taxation by the State of Washington. The case is significant here because the plaintiff in *Goudy* had obtained his fee patent pursuant to treaty, not pursuant to the General Allotment Act. Plaintiff here suggest that *Goudy* is no longer good law, and is distinguishable in a number of other respects. *Goudy* has never been overruled, however; and was cited and discussed just months ago by the Ninth Circuit in *Yakima*.

In light of this disposition, it is not necessary to address defendants' further argument that plaintiff is barred by the statute of limitations or by laches from challenging the taxability of its lands.

Defendants' motion to add the State of Washington as a party defendant is likewise moot, in light of this ruling. So long as Whatcom County is entitled to levy and collect taxes against this land, the county is not subject to any conflicting obligation to the State of Washington. Defendants' motion for joinder is therefore denied.

The Clerk is directed to enter judgment for defendants and against plaintiff, and to provide copies of

this order and of the judgment to counsel for both parties.

DATED this 27 day of April, 1990.

JOHN L. WEINBERG
United States Magistrate

APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

LUMMI INDIAN TRIBE, Plaintiff-Appellant, v. WHATCOM COUNTY, WASHINGTON; BARBARA CORY, TREASURER OF WHATCOM COUNTY, Defendants-Appellees.	No. 91-35622 **ORDER AND AMENDED OPINION**

Argued and Submitted
August 20, 1992
Submission Withdrawn May 3, 1993
Resubmitted September 24, 1993
Decided October 1, 1993
As Amended on Denial of Rehearing
and Suggestion for Rehearing En Banc
December 23, 1993
Order Granting Motion
to Reenter Judgment
April 19, 1994
Before: WRIGHT, BEEZER, and LEAVY,
Circuit Judges.

COUNSEL

Harry L. Johnsen, Office of the Reservation Attorney, Lummi Indian Tribe, Bellingham, Washington, for plaintiff-appellant.

Robert A. Carmichael, Special Deputy Prosecuting Attorney, Bellingham, Washington, for defendants-appellees.

OPINION

EUGENE A. WRIGHT, Circuit Judge:

The Lummi Indian Tribe appeals from summary judgment denying it declaratory and injunctive relief from the assessment and collection of Washington's ad valorem property tax. The Tribe contends that its fee-patented reservation land is exempt from taxation because it was allotted to the Tribe under the Treaty of Point Elliott rather than the General Allotment Act, which permits such taxation. We disagree that reservation land should be treated differently because it was patented under a treaty. We affirm.

I

The Lummi Indian Reservation was created in 1855 by the Treaty of Point Elliott, a compact between the United States and numerous tribes and bands of Indians in northern Puget Sound. Under the terms of the Treaty, the Lummi ceded all rights to a significant section of Western Washington, in return for exclusive

use of reservation lands. The Treaty also authorized the subdivision of the Reservation into parcels, which could be assigned or allotted to individuals or families.

In 1884, the government carried out the treaty terms, dividing 10,500 acres of the Reservation into 72 assignments or allotments and issuing fee patents, subject to restrictions on alienation and exempt from levy, sale and forfeiture. The taxability of four parcels, all now owned by the Tribe in fee patent status, is at issue in this case.

The first parcel is a portion of an original assignment made to Lewis Kichowilton. After his death, Kichowilton's heirs divided his allotment among themselves, with the parcel at issue deeded to Mary George, a member of the Tribe. Upon George's death, Irene Miller, a Canadian Indian, inherited the land. Because the United States had no supervisory responsibility over Miller, the Bureau of Indian Affairs issued an "Order Removing Restrictions," allowing Miller to alienate the parcel. In the 1970s, the Tribe purchased it from a non-Indian owner.

The other three parcels were originally assigned to John A. Jones. In 1916, after determining that Jones was "fully competent and capable of transacting his own business," the Secretary of the Interior issued him a "Certificate of Competency." *See* 25 U.S.C. §372 (1988). It removed any restrictions on Jones' ability to alienate the land. The Tribe purchased these parcels in the early 1980s.

Under state law, Whatcom County has levied and collected ad valorem property tax payments on these reservation fee lands. In May 1989, the Tribe filed suit,

claiming that the tax violated federal law. It sought declaratory and injunctive relief; a refund of taxes, interest and penalties collected; and damages for civil rights violations under 42 U.S.C. §1983. The parties filed cross motions for summary judgment. A magistrate judge entered summary judgment against the Tribe, finding that the case was controlled by our decision in *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 893 F.2d 1044, modified, 903 F.2d 1207 (9th Cir.1990), aff'd, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). The Tribe timely appealed. We have jurisdiction under 28 U.S.C. §1291.

II

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), the Court held that the General Allotment Act of 1887[1] permitted Yakima County to impose an ad valorem tax on reservation land patented in fee under the Act and owned by reservation Indians or the Nation itself. The Court expressly refused to decide whether parcels patented under an act other than the General Allotment Act are also taxable. See *Yakima Nation*, --- U.S. at ----, 112 S.Ct. at 694. The Lummi contend that because their fee patents were issued under the Treaty of Point Elliott, rather than the

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[1]The Act authorized the government to issue 25-year trust patents to Indians. These patents contained restrictions against alienation that expired once the trust period ended. Under the proviso to Section 6 of the Act, the Secretary of the Interior could remove the restrictions earlier if he found an Indian competent to manage his or her own affairs.

General Allotment Act, Whatcom County may not tax the parcels.

We must decide one of the questions left open by *Yakima Nation*: whether reservation land should be treated differently because it was patented under a treaty. Because the Court in *Yakima Nation* focused on the Yakima's ability to alienate their land, rather than on how it was allotted, we conclude that if the Lummi land is alienable, it is taxable.

A. Alienability as a Basis for Taxation

A state cannot tax reservation lands or reservation Indians unless Congress has " 'made its intention to [authorize state taxation] unmistakably clear.' " *Id.* at ---, 112 S.Ct. at 688 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985)). In *Yakima Nation*, the Court found an unmistakably clear intent to tax fee-patented land. It did not rely on section 6 of the General Allotment Act as Yakima County proposed,[2] concluding instead that the

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[2]Section 6 provides:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, ... then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside ... Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and

land's alienable status determines its taxability. *See Id.* at --- U.S. ----, 112 S.Ct. at 688-691. The Court made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints against alienation expire.

The Court found further support for this conclusion in its decision in *Goudy v. Meath*, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906). In *Goudy*, a Puyallup Indian claimed exemption from real property taxation under the Treaty of December 26, 1854, which, like the Treaty of Point Elliott, was patterned after the Treaty with the Omahas. 203 U.S. at 146, 27 S.Ct. at 48. The Treaty of the Omahas allowed the President to issue a restricted patent on allotted lands. *Id.* at 147, 27 S.Ct. at 50. The restrictions on alienation would remain until the state legislature, with Congressional consent, removed them. *Id.* The Court decided that once the land allotted under the treaty became alienable, it also became taxable. *See Id.* at 150, 27 S.Ct. at 50. In so deciding, the Court relied in part on the General Allotment Act provisions that made an Indian subject to the state laws once restrictions on the land were removed. *See Id.* at 149, 27 S.Ct. at 50.

The *Yakima Nation* Court approved Goudy's holding, citing *Goudy* for the proposition that alienable land is taxable unless explicitly exempted:

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thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed...." 25 U.S.C. §349.

> although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." For "it would seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [*sic*] from taxation."

Yakima Nation, --- U.S. at ----, 112 S.Ct. at 691 (alteration in original) (citation omitted). The logic propounded by the Goudy Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

B. Alienability of the Four Parcels

Though the four parcels were at one time alienable, the Tribe argues that the Indian Nonintercourse Act, 25 U.S.C. §177, renders the land inalienable upon reacquisition by the Tribe. We disagree.

The Act provides, in pertinent part,

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from

> any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. §177. The Act has not changed materially since its passage, in 1790, at the insistence of President Washington and Secretary of War Henry Knox. *See* Susan C. Antos, Comment, Indian Land Claims Under the Nonintercourse Act, 44 Alb.L.Rev. 110, 111, 120 (1979). President Washington and Secretary Knox thought that only the federal government could ensure Indian lands were settled peacefully and Indians treated fairly. *Id.* at 111. Courts considering the Act's purpose have agreed that Congress intended to protect Indians from the "greed of other races," *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), and from "being victimized by artful scoundrels inclined to make a sharp bargain," *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 888 (2d Cir.), cert. denied, 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76 (1958), vacated as moot sub nom., *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009 (1960).

The Tribe relies on two lines of cases, arguing that any lands held by a tribe, even those held in fee, are inalienable under the Act. First, courts have held that the Act applies to tribal lands regardless of how it was acquired. *Tuscarora Nation* 257 F.2d at 887-91 (acquisition by purchase); *United States v. 7405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir.1938) (same). The purchases in those cases were made for or by a tribe during the 1800s and, in *7405.3 Acres*, had since been conveyed to the United States in trust for the tribe. In contrast, the Lummi parcels are held in fee by the Tribe,

which purchased them during the 1970s and 1980s, after the United States approved their alienation.

The second line of cases on which the Tribe relies involves Pueblo lands. See *Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023; *Alonzo v. United States*, 249 F.2d 189 (10th Cir.1957), cert. denied, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958). The courts in those cases held that Pueblo fee land was inalienable. Congress has acted repeatedly to ensure that Pueblo lands remain subject to restrictions against alienation. See *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853, 105 S.Ct. 177, 83 L.Ed.2d 111 (1984); *Alonzo*, 249 F.2d at 193-95. By contrast, the federal government has made no move to protect this Lummi land.

The Tribe asks us to extend the reasoning in the preceding lines of cases to land for which the government previously had removed the restraints on alienation. We decline to do so.

The federal government has provided a means whereby Indians may convey land in trust to the government and thus remove the land from state tax rolls. *See* 25 U.S.C. §465 (1988). In fact, one of the factors that the BIA must consider in deciding whether to accept new trust land is the effect on a state of removing the land from its tax rolls. See 25 C.F.R. §151.10(e) (1992).

No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the

Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06, 106 S.Ct. 2039, 2043-2044, 90 L.Ed.2d 490 (1986) (Congressional act terminating federal services and statutory protections of Indians); *Larkin v. Paugh*, 276 U.S. 431, 433-34, 439, 48 S.Ct. 366, 366-367, 368, 72 L.Ed. 640 (1928) (with the issuance of fee simple patent under Burke Act of 1906, 34 Stat. 182, "title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated"). Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. See 25 U.S.C. §372 (1988 & Supp. II 1990). Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable.

We hold that the parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act. Because the parcels are alienable, they are also taxable.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, --- U.S. ----, ----, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30 (1993), Justice O'Connor, writing for a unanimous court, stated:

> Absent explicit congressional direction to the contrary, we presume against a State's having

> the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

While Sac & Fox Nation focused on income and motor vehicle taxes, its broad, strong language reiterates our duty to find explicit congressional permission whenever we allow state taxation. The opinion filed today concludes that *County of Yakima v. Yakima Indian Nation*, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) holds that if the Lummi land is alienable, it is taxable. I believe this analysis is incomplete.

As a threshold matter, certain canons of construction apply in the area of federal Indian law. The Supreme Court has stated:

> [A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.... And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intentions to do so unmistakably clear.' *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985).

Yakima Indian Nation, --- U.S. at ----, 112 S.Ct. at 689 (emphasis added).

The crux of the analysis in the opinion filed today can be succinctly stated in three steps. First, a state cannot tax reservation lands unless Congress has made this intention unmistakably clear. Second, Yakima

Indian Nation found such clarity in the General Allotment Act ("GAA") sections on alienability. Third, *Yakima Indian Nation* holds that where Congress provides that Indian lands are alienable, Congress has made it clear that the land is taxable.

This legal interpretation misses the point. The land involved in this case is not GAA-patented land. We need to find the unmistakably clear intent of Congress to allow taxation on these particular lands, lands which do not come under the GAA. The Supreme Court in *Yakima Indian Nation* did not ignore how the land was allotted; the method of land allotment is crucial in federal Indian law. Accordingly, *Yakima Indian Nation* does not answer the crucial question in this case: Has Congress made it unmistakably clear that these lands may be taxed by the state?

There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future. *Yakima Indian Nation* is a case of statutory interpretation which presents a detailed analysis of the language and structure of the GAA as it applies to allotments and patents issued under its particular provisions. Through its analysis, the Supreme Court found Congress' unmistakably clear intent to permit state taxation of reservation fee lands allotted under the Act.

The same type of analysis must be applied to an allotment or assignment made under other statutory authority. We need to look to the Treaty of Point Elliott and 25 U.S.C. §372, the statutory authority underlying these patents, to decide this case. Because

that analysis has not been undertaken, I respectfully dissent.

ORDER
December 23, 1993

The opinion filed October 1, 1993, slip op. 11081, and appearing at 5 F.3d 1355 (9th Cir.1993), is amended as follows:

[Editor's Note: The amendments have been incorporated into published opinion.]

With these amendments, Judges Wright and Leavy have voted to deny the petition for rehearing. Judge Beezer would grant the rehearing petition. Judges Beezer and Leavy have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUMMI INDIAN TRIBE, Plaintiff-Appellant, v. WHATCOM COUNTY; BARBARA CORY, Defendants-Appellees.	No. 91-35622 D.C. No. CV-89-696-W **ORDER GRANTING MOTION TO REENTER JUDGMENT**

Before: WRIGHT, BEEZER and LEAVY, Circuit Judges.

The motion of the appellant filed on April 6, 1994 to reenter the judgment heretofore entered on December 23, 1993, there being no objection by opposing counsel, is **GRANTED.** The mandate will be recalled and the clerk will enter a new judgment.

Filed April 19, 1994

APPENDIX C

TREATIES AND STATUTES INVOLVED

ARTICLE 7. Treaty of Point Elliott, 12 Stat. 927 (1859):

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations herein before made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 6. Treaty With the Omahas, 10 Stat. 1043 (1854):

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and until a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such

person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

§177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the

compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

§331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for

allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.

§348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after

patents therefor have been executed and delivered, except as herein otherwise provided: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of

Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the

least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

§349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided,* That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

§372. Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: *Provided,* That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid on such deferred payments, all payments made, together with all interest paid on such deferred installments, shall be so forfeited for failure to comply with the terms of the sale. All

forfeitures shall inure to the benefit of the allottee or his heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided,* That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear: *Provided further,* That the Secretary of the Interior is authorized, in his discretion, to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: *Provided further,* That any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: *Provided,* That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior.

Supreme Court, U.S.
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No. 93-1742

In The

Supreme Court of the United States

October Term, 1993

LUMMI INDIAN TRIBE,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

May 27, 1994

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FOLLOWING QUESTIONS PRESENT THIS COURT WITH "SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE LUMMI INDIAN TRIBE'S PETITION FOR A WRIT OF CERTIORARI?

I. Whether the Ninth Circuit erred in deciding that land owned in fee by the Lummi Tribe is taxable if it is alienable?

II. Whether four parcels of alienable land on the Lummi Indian Reservation became inalienable upon acquisition by the Lummi Tribe in fee during the 1970's and 1980's?

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF FACTS AND LAW

Pursuant to Rule 15.1, the following are perceived misstatements of fact and law in the Lummi Tribe's petition which may have bearing on the issues presented.

(1) The statement on p. 4 of the petition that the factual history of the Lummi parcels is not in dispute is true only insofar as all facts were reviewed in a light most favorable to petitioner when the District Court granted respondents' Motion for Summary Judgment.

(2) Several statements are made concerning an alleged conflict between the present decision of the Ninth Circuit and the law of the Tenth Circuit. See pp. 16-18 of Petition for Writ of Certiorari. This is an inaccurate statement of the law. There is no such conflict between the circuits. See pp. 11-13 of this Brief.

SUMMARY OF ARGUMENT

(1) The Ninth Circuit's decision in the case at bar is consistent with the only two other cases decided by this Court concerning ad valorem taxation of Indian owned fee lands. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992); *Goudy v. Meath*, 203 U.S. 146, 27 S. Ct. 48, 51 L. Ed. 130 (1906). The Court in *Goudy* decided that alienable Indian land was generally subject to ad valorem taxation. The analysis of *Goudy* was reviewed and cited approvingly by this Court in dicta, in *Yakima Nation*. The present case involves land patented pursuant to the same treaty that the land was patented under in *Goudy*. There being no legitimate distinction between *Goudy* and the present case, the petition should be denied.

(2) The Ninth Circuit's holding that the subject parcels of fee land did not become inalienable upon their acquisition by the Lummi Tribe in the 1970's and 1980's does not conflict with the law of the Tenth Circuit. Petitioner points to no cases of this Court with which the Ninth Circuit's decision conflicts. The analysis of the Ninth Circuit being sound on this issue, their remains no reason to accept review of the petition.

ARGUMENT

Rule 10 states that "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Guidance is provided in Rule 10.1.(a)-(c) in identifying reasons which may be considered special or important. Among the reasons identified are:

> (1) a conflict among two or more United States courts of appeal;
>
> (2) a conflict between a United States court of appeal and a state court of last resort over a federal question;
>
> (3) a United States court of appeal has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for the Court's supervision;
>
> (4) a state court or a United States court of appeal has decided an important question of federal law which should be settled by the Court, or has decided a federal question in a way that conflicts with applicable decisions of the Court.

The Lummi Tribe's petition very obviously does not qualify under the first three reasons. Only under the last basis can a colorable argument be made by the Lummi Tribe for certiorari being granted. As expressed below however, the Lummi Tribe's petition also fails to present a convincing case for accepting review under the fourth reason identified.

I. THE NINTH CIRCUIT'S RULING IS CONSISTENT WITH THIS COURT'S DECISIONS REGARDING INDIAN-OWNED FEE LAND ON A RESERVATION BEING SUBJECT TO STATE AD VALOREM TAXATION.

The Ninth Circuit's ruling in the case at bar is predicated upon two prior decisions of this Court – *Goudy v. Meath*, 203 U.S. 246, 27 S. Ct. 48, 51 L. Ed. 130 (1906) and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S. Ct. 2d 683, 116 L. Ed. 2d 687 (1992). This Court in *Goudy* was presented with the question of whether allotted land owned in fee by a Puyallup Indian was subject to state ad valorem taxation. *Goudy v. Meath*, 51 L. Ed. at 130. In *Goudy*, the land was patented under the authority of the Treaty with the Omahas (1854), which is the same treaty under which patents were authorized for the land in the present case. *Goudy v. Meath*, 51 L. Ed. at 131. The land in *Goudy* was not patented pursuant to the General Allotment Act.

The *Goudy* Court held the land was subject to state ad valorem taxation. *Id* at 132. The primary rationale for upholding the land's taxability in *Goudy* was not the General Allotment Act, but the alienable status of the land. Eighty-six years later, this Court recognized the land's alienability as the primary basis for its decision in *Goudy*:

> *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in the present case not by § 6 of the General Allotment Act, but by

> § 5 – that the Court found of central significance. As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.*, at 149, 27 S. Ct. at 50, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.* For "it would seem strange to withdraw (the) protection (of the restriction on alienation) and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it (*sic*) from taxation." *Ibid.* Thus, when § 5 rendered the lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

County of Yakima v. Yakima Indian Nation, 502 U.S. ___, 112 S. Ct. at 690-91 (emphasis in original).

Under the above-cited analysis, once the power of voluntary sale is granted, the land will be subject to taxation unless another intent is clearly manifested. *Goudy v. Meath*, 51 L. Ed. at 132.

Petitioner points out that a tax exemption and nonalienability are two separate subjects. Petition for Writ of Certiorari, p. 10, citing *Choate v. Trapp*, 244 U.S. 665, 673 (1912). The *Goudy* Court also recognized this to be true. The *Goudy* Court stated "That Congress may grant the power of voluntary sale while withholding the land from taxation or forced alienation may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandotts (10 Stat. at L. 1159, 1161)." *Goudy v. Meath*, 51 L. Ed. 132.

The fact that a tax exemption and non-alienability may conceptually be severed however does not help the petitioner. Congress historically included within treaties specific tax exemptions for voluntarily alienable Indian lands when it intended such exemptions.[1] The absence of such an exemption in the Treaty with the Omahas is evidence that Congress intended such land to be subject to taxation.

Cases cited by petitioner to prove the Court turned away from state taxation on Indians involved taxation of items (e.g., personal property, income, sales) which, unlike fee land, were not historically named in treaties as

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[1] Explicit fee land tax exemptions are present in other treaties. In *Choate v. Trapp*, 424 U.S. 665, 56 L. Ed. 941 (1912), the Supreme Court recognized that a prior treaty with the Choctaw and Chickasaw Tribes and an accompanying Congressional statute containing an explicit 21-year tax exemption for Indian-held fee land created a vested property right under the Fifth Amendment which could not be abrogated by later statute. *Id.* at 56 L. Ed. 946 -947. The Court in *Choate* also referred to a Treaty with the Delaware Tribe wherein the Indians were to receive fee lands which the agreement declared "should not thereafter be subject to tax." *Choate v. Trapp*, 56 L. Ed. at 946, citing *New Jersey v. Wilson*, 3 L. Ed. 303. This agreement vested the Indians with a binding, constitutionally protected right. *Choate v. Trapp*, 56 L. Ed. 946.

The treaties with the Wyandotts referred to in *Goudy*, the Choctaw and Chickasaw Tribes reviewed in *Choate* and the Delaware Tribe referred to in *Wilson*, all contained various express provisions exempting Indian-held fee land from taxation. The Treaty with the Omahas, under which petitioner's allotments were made, contained no such express provision. Treaty with the Omahas, Article 6, 10 Stat. 1043; See Petition for Writ of Certiorari, Appendix C-2.

exempt from taxation. See Petition for Writ of Certiorari, pp. 7-9.

The plain language of *Goudy* does not contain the same limitations on ad valorem taxation which this Court has later placed upon other kinds of taxes. Under *Goudy*, alienable land is taxable, unless Congress otherwise directs. Moreover, the *Goudy* decision was twenty-eight (28) years old when Congress abruptly changed its Indian policies with adoption of the Indian Reorganization Act in 1934. The significance of this was noted by the Court in *Yakima Nation*:

> And when Congress, in 1934, while putting an end to further allotment of Reservation land, see 25 USC § 461, chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs and assigns, [citing authorities], it chose not to terminate state taxation upon those lands as well.

Id. at 691. (Emphasis in original).

Under the holding by the Court in *Goudy* and its reasoning in *Yakima Nation*, it is clear that alienable land held by the Lummi Indian Tribe is taxable.

Despite the Court's ruling in *Goudy* and the favorable review of *Goudy* in *Yakima Nation*, petitioner makes several contentions why certiorari should nevertheless be granted. Petitioner first argues that the Burke Act's 1906 amendment to § 6 of the General Allotment Act which provided for removal of "all restrictions as to sale, incumbrance or taxation of said land," is the only grounds upon which Indian owned fee land may be subject to state ad valorem taxation. Petition for Writ, pp. 9-12.

In support of this contention, petitioner relies upon two "factors." First, petitioner argues that if the removal of restrictions on sale was sufficient to render the land taxable, Congress would have found it unnecessary to include the removal of "restrictions as to . . . taxation," as well as the removal of "restrictions as to sale," both of which are found in the proviso of the amendment to section 6.

Putting aside the fact that this argument ignores *Goudy* and the Court's interpretation of *Goudy* in *Yakima Nation*, the argument also ignores the purpose of the Burke Act. In *Yakima Nation*, the Court found the purpose of the Burke Act was to "change the outcome of our decision in *In re Heff*" and to allow for issuance of fee patents prior to expiration of the trust period, without subjecting Indians to the full plenary power of the state. *Id.* at 691. The Burke Act proviso on state taxation in § 6 was designed to preserve the rule of taxability for lands patented in fee prior to expiration of the trust period. The *Yakima* Court succinctly noted:

> In other words, the proviso reaffirmed for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.

Id. at 691.

The Court also noted that the proviso was "nothing more than an acknowledgement (and clarification) of the

operation of section 5 with respect to *all* fee patented land . . . ". *Id.* at 691, n.4.[2]

Hence, the clear purpose of the proviso was to provide clarification for the status of prematurely patented land. It strains credulity to suggest that, in an attempt to provide such clarification, by stating the restrictions as to sale and taxation in the same proviso, Congress evinced an intent to exempt all non-General Allotment Act Indian fee lands from taxation. Petitioner's argument further unravels upon realization that when Congress, in 1934, put an end to further allotment of reservation land, it chose not to terminate state taxation upon those lands already allotted. See argument on p. 7, citing *Yakima Nation* at 691.

Second, petitioner points out that the *Yakima Nation* Court upheld state ad valorem taxation under the § 6 proviso of the General Allotment Act, but invalidated the state's excise tax on the sale of fee land by Indians. Petitioner argues that if the emphasis on the consequences of alienability in *Goudy* were sufficient by itself subject the land to taxation, then that emphasis would have been sufficient to subject to taxation the freely alienable proceeds of the sale of the land. Petition for Writ Of Certiorari, p. 12.

Again, petitioner's argument assumes that this Court misanalyzed the *Goudy* ruling in *Yakima Nation*. Contrary to petitioner's implication however, this Court in *Goudy* very clearly decided the land was taxable based upon its

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[2] Presumably the Court was referring to all land patented under the General Allotment Act.

alienability and this Court in *Yakima Nation* very clearly recognized that fact. *Id.* at 690-691 (quoted on pp. 4-5 herein). Moreover, the *Yakima Nation* Court distinguished an ad valorem tax from an excise tax. The ad valorem tax flows exclusively from ownership of realty on the annual assessment date. *Id.* at 692, *Timber Traders, Inc. v. Johnston*, 87 Wn. 2d 42, 47, 548 P. 2d 1080, 1083 (1976). The tax creates a burden on the property alone. *Yakima Nation* at 692, R.C.W. 84.60.020. The ad valorem tax constitutes taxation of land. *Yakima Nation* at 692.

On the other hand, an excise tax is not a tax upon the land, but a tax upon the sale of land. *Id.* at 693, citing, *Mahler v. Tremper*, 40 Wn. 2d 405, 409, 243 P. 2d 627, 629 (1952). While an excise tax may not be inconsistent with *Goudy*, such a tax is certainly not directly authorized by *Goudy*. The *Yakima Nation* Court was not prepared to extend taxation to Indian fee land owners beyond that afforded by in rem jurisdiction. The Court's decision on the excise tax issue has no impact on the continued viability of *Goudy v. Meath*.

Finally, petitioner seeks to undermine the importance of *Goudy* by arguing facts which appear nowhere in the Court's decision and upon which the decision was clearly not based. Petitioner states that the "crucial fact" in *Goudy* is that Mr. Goudy was formerly a member of the Puyallup Tribe who at the time had entirely severed his Tribal relation. Petition for Writ of Certiorari, p. 13. The decision of the Court, however, simply refers to Mr. Goudy as a Puyallup Indian and makes no mention of severed tribal relations. *Goudy v. Meath*, 203 U.S. 246, 27 S. Ct. 48, 51 L. Ed. at 131. The decision is written as applicable to an Indian claiming a tax exemption by virtue of the

Treaty with the Omahas. It is inappropriate to add facts which are not mentioned in the opinion, much less rely upon them as an invisible basis for the decision.

II. THE FOUR SUBJECT PARCELS OF FEE LAND ON THE LUMMI RESERVATION DID NOT BECOME INALIENABLE UPON THEIR ACQUISITION BY THE LUMMI TRIBE IN THE 1970'S AND 1980'S.

Petitioner argues that certiorari should be granted due to an alleged conflict between the Ninth Circuit's decision in this case and the law of the Tenth Circuit. Specifically, petitioner argues that in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), the Tenth Circuit applied the Non-Intercourse Act (25 USC 177) to restrict the sale of fee land purchased by the Pueblo Indians between 1936 and 1939. Petition for Writ of Certiorari, p. 17. Petitioner incorrectly suggests that the Tenth Circuit categorically applies 25 USC 177 to restrict alienation of all tribally-owned fee land.

The Pueblo Indians (the Pueblo) are a relatively special case, and *Alonzo* is inapposite to the case at bar. The Pueblo, prior to the Treaty of Guadalupe Hidalgo, held good and complete title to lands now in New Mexico, including the land later reacquired by the Pueblo, which was at issue in *Alonzo*. *Id.* at 192-193, 196. Title of the Pueblo to the lands at issue was confirmed by Congress in 1860 and patented in 1884. *Id.* at 193. The Pueblo, collectively, as a community, were held to have fee simple title to the lands of the Pueblo. *United States v. Candalaria*, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023, 1025 (1926).

Congress has consistently acted to ensure Pueblo lands are not freely alienable or taxable. In 1851, Congress extended the Non-Intercourse Act to the Pueblos. *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984). A decision by the territorial court holding the Pueblo lands taxable in 1904 was promptly followed by a congressional enactment annulling the taxes already levied and forbidding further levies. *United States v. Candalaria*, 70 L. Ed. at 1026; *Alonzo v. United States*, 249 F.2d at 194.

In 1906 (under the New Mexico Enabling Act), Congress declared that the lands of the Pueblo Indians "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." *United States v. University of New Mexico*, 731 F.2d at 706. This was at a time when fee patent lands issued to members of other tribes were alienable and taxable. See 25 USC 349; *Goudy v. Meath*, 51 L. Ed. at 132. In 1924, Congress again prohibited sale of any Pueblo lands. *Alonzo v. United States*, 249 F.2d at 195. On the heels of these congressional prohibitions on sale of Pueblo fee lands, the *Alonzo* court ruled that land purchased by the Pueblos from 1936-1939 from territory disputed under their original claim, was not alienable. *Id.*

Petitioner points to no such recent or continual congressional prohibitions on sale of land held by the Lummi Tribe. The Lummi lands were patented and made freely alienable pursuant to acts of Congress. See Petition for Writ of Certiorari; 25 USC 372. Petitioner cites no act of Congress subsequent to issuance of the fee patents requiring the lands at issue to return to non-alienable

status upon their reacquisition by the Tribe. Further, petitioner cites no judicial authority requiring that Indian land approved for alienation by Congress and later reacquired by a tribe must return to non-alienable status pursuant to 25 USC 177.

Finally, contrary to petitioner's assertion, *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993), does not rule that 25 USC 177 renders tribally-owned fee land inalienable absent federal approval. In *Buzzard*, the tribe's charter prohibited it from disposing of fee land without approval by the Secretary of the Interior. *Buzzard v. Oklahoma Tax Commission*, 992 F.2d at 1075. The Lummi Tribe asserts no similar prohibition in its charter. Most significantly, the *Buzzard* court specifically declined to rule whether 25 USC 177 requires federal approval prior to tribal sale of fee lands. *Buzzard v. Oklahoma Tax Commission*, 992 F.2d at 1077. Hence, contrary to petitioner's claim, the issue is obviously not settled in the Tenth Circuit and this Court's decision would not conflict with the law therein.

Should the Lummi Tribe prefer its recently purchased fee land to become inalienable and not subject to tax, it may convey said land in trust to the government and thereby remove it from state tax rolls. 25 USC 465. In fact, one of the factors the BIA considers in deciding whether to accept new trust land is the effect on a state of removing the land from its tax rolls. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), citing 25 CFR § 151.10(3) (1992).

CONCLUSION

The Lummi Indian Tribe's petition fails to demonstrate a conflict among the United States circuit courts of appeal. Likewise, the petition does not demonstrate the existence of a conflict between the Ninth Circuit's decision and applicable decisions of this Court. On the contrary, the Ninth Circuit's decision is consistent with the two cases from this Court concerning state ad valorem taxation of Indian owned fee land.

Unfortunately for the petitioner, *Goudy v. Meath*, 51 L. Ed. 132, is virtually indistinguishable from the case at bar. Both cases involve an ad valorem tax exemption claim for Indian owned fee land, patented pursuant to authority from the Treaty with the Omahas (1854). The Court in *Goudy* found the land to be taxable because it was alienable and this reasoning was cited with approval by the Court in *Yakima Nation*.

In deciding *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), the Ninth Circuit scrupulously followed this Court's ruling in *Goudy* and its interpretation of *Goudy* in *Yakima Nation*. The Ninth Circuit's decision is quite consistent with the Court's decisions on ad valorem taxation. For all of these reasons, the Lummi Tribe's petition should be denied.

Respectfully submitted this 27th day of May, 1994.

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ON PETITION FOR WRIT OF *CERTIORARI*
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FOR THE NINTH CIRCUIT

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* AND BRIEF OF *AMICUS CURIAE* BLACKFEET TRIBE OF INDIANS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* AND BRIEF OF *AMICUS CURIAE* BLACKFEET TRIBE OF INDIANS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Blackfeet Tribe of Indians of the Blackfeet Reservation, Montana (the "Tribe"), through its attorneys and pursuant to Supreme Court Rule 37.4, respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petition for Writ of Certiorari filed on behalf of the Lummi Indian Tribe.* A copy of the letter by which counsel for the Petitioner has consented to the Tribe's participation as amicus curiae is attached at Appendix A. Counsel for the Respondent Whatcom County, Washington has told counsel for the Petitioner that the Respondent will not consent to the participation of any amicus. The Tribe hereby files this motion with the belief that the nature of the Tribe's interest, set forth below, will provide this Court with a unique perspective from which to review the issues raised in this proceeding.

DISCUSSION

The Tribe is a federally recognized tribe organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461 et seq. The Tribe owns land in fee within the boundaries of the Blackfeet Reservation which was patented pursuant to statutes other than the General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq.

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* The Petition was filed with the Court on May 2, 1994. Counsel for Petitioner was informed that the Whatcom County Prosecuting Attorney's Office received the Petition on that same day. Pursuant to Supreme Court Rule 37.2, this Motion and Amicus Brief must be filed by June 1, 1994. See also S.Ct. Rule 29.2.

In 1986, the Tribe filed suit in the United States District Court for the District of Montana challenging the imposition of state property taxes against real property owned in fee by the Tribe within exterior boundaries of the Blackfeet Indian Reservation. See Blackfeet Tribe v. LaFaver, No. CV-86-23-GF (D. Mont.). The Tribe, the State of Montana and the two affected counties negotiated a resolution of that case in which the State parties agreed to return taxes previously collected on the tribally owned properties, to cancel all entries of property tax delinquencies or liens against the tribally owned properties, and to discontinue assessing or demanding payment of property taxes attributable to any real property solely owned by the Tribe or attributable to its ownership interest in a parcel of property.

The question presented in the Petition for Writ of Certiorari is an issue this Court left unanswered when it decided County of Yakima v. Yakima Indian Nation, 502 U.S. ___, ___, 112 S.Ct. 683, 694, 116 L.Ed.2d 687 (1992): whether lands owned by an Indian tribe and patented in fee under statutes other than the General Allotment Act, 25 U.S.C. § 331, et seq., are subject to a state ad valorem tax absent an unmistakably clear congressional grant of such taxing authority to the states. That issue directly affects and impacts certain fee lands owned by the Tribe as well as the legitimacy of the law and policy that is the foundation of the Tribe's Agreement with the State parties. The Tribe and the State parties have relied on this Agreement since its execution in January, 1987. The Tribe is vitally concerned that the protections afforded its property under the Agreement continue in full force and effect consistent with federal law and policy. Those laws and policies are directly at issue in Lummi Indian Tribe v. Whatcom County, Washington, Case No. 93-1742 (Petition filed May 2, 1994), and the protections afforded the Tribe are threatened should the decision of the United States Court

of Appeals for the Ninth Circuit in Lummi Indian Tribe v. Whatcom County Washington, et al., 5 F.3rd 1355 (9th Cir. 1993) be allowed to stand.

WHEREFORE, the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, respectfully requests that this Court GRANT its Motion to File Brief Amicus Curiae in Support of the Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of the Blackfeet Tribe of Indians of the Blackfeet Reservation (the "Tribe") are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Petition for Writ of Certiorari and are incorporated herein by reference.

STATEMENT OF THE CASE

The background, nature and disposition of the proceedings before the United States Court of Appeals for the Ninth Circuit are set forth in the Petition for Writ of Certiorari (hereafter cited as "Petition at ___") filed by the Lummi Indian Tribe. See Petition at 2-6.

SUMMARY OF ARGUMENT

Supreme Court Rule 10.1(c) indicates that a Petition will be considered when:

> a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case not only fulfills both requirements, but has ramifications throughout Indian country because numerous Indian tribes, including the Blackfeet Tribe, have acquired and currently own land in fee that was not originally patented pursuant to the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq.

In County of Yakima v. Yakima Indian Nation, 502 U.S. ___, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(hereafter "Yakima"), this Court left for later resolution the issue of whether a state can impose an ad valorem tax on Indian owned land that was patented in fee pursuant to statutes other than the General Allotment Act. 112 S.Ct. at 694. That issue is presented in the Lummi Tribe's Petition with respect to land acquired and owned in fee by that Tribe. In resolving that issue in favor of state taxation, the Ninth Circuit held that the statute under which the land was allotted did not matter, the sole determining factor being whether the land was alienable. See Lummi Indian Tribe v. Whatcom County, Washington, et al., 5 F.3d 1355, 1359 (9th Cir. 1993) (hereafter "Lummi") ("We hold that . . . [b]ecause the parcels are alienable, they are also taxable."). This holding is in direct conflict with this Court's analysis in Yakima as well as a long line of cases which require that Congress make its intent to tax Indian land unmistakably clear. It is now incumbent upon this Court to issue the writ of certiorari and address the issue it left unanswered in Yakima by reversing the Ninth Circuit and, once again "lay[ing] to rest any doubt . . . that . . . taxation [of Indian land] is not permissible absent [explicit] congressional consent." State of California v. Cabazon Band of Indians, 480 U.S. 202, 215 n. 17, 107 S.Ct. 1083, 1091 n.17, 94 L.Ed.2d 244 (1987).

REASONS THE WRIT SHOULD BE ISSUED

A. The Ninth Circuit's Decision Ignores the Analysis this Court Applied in Yakima Which Requires an Unmistakably Clear Congressional Grant to the States of the Authority to Tax Indian Land.

In Yakima this Court asked, but did not directly answer, whether Indian owned fee land alienated pursuant to statutes other than the General Allotment Act was subject to state taxation. Yakima, 112 S.Ct. at

694.[1] But the Court's analysis in Yakima leads to the answer to the question posed: while Congress may allow an Indian to alienate land, a state cannot tax that land absent specific congressional authorization explicitly providing for and defining the extent and nature of the state's taxing authority. This analysis follows what has oft times been referred as the per se rule of state taxation of Indian tribes: Indian property is never subject to state taxation absent explicit congressional authorization. See Yakima, 112 S.Ct. at 687-88.[2] While the Court

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[1] The Court also did not directly address the effects of an Indian tribe subsequently acquiring land previously alienated by individual Indians pursuant to the terms of the General Allotment Act.

[2] An explicit congressional declaration is required because "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . .' Choate v. Trapp, 224 U.S. [665,] at 675, 56 L.Ed. 941, 32 S.Ct. 565 [1912]." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 n.4, 105 S.Ct. 2399, 2403 n.4, 85 L.Ed.2d 753 (1985). Such a liberal construction required the continuation of the tax exemption enjoyed by Indian trust patent holders when their land was patented in fee, absent a congressional declaration to the contrary. The Burke Act, Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. § 349, included such an explicit declaration with respect to lands patented under the General Allotment Act. See Yakima, 112 S.Ct. at 694.

Moreover, the courts must construe the statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112

(continued...)

recognized that the Indian owned land was implicitly subject to state taxation only if it was alienable, it only upheld the State of Washington's authority to impose its ad valorem tax on Indian land owned in fee, upon its determination that Congress explicitly authorized such a tax in the Burke Act. The Lummi decision directly conflicts with this Court's analysis in Yakima, because the Lummi court upheld state taxation based solely on the fact that the land had, prior to its acquisition by the Lummi Tribe, been allotted under the Treaty of Point Elliot and, at some later point, sold.[3]

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[2](...continued)
S.Ct. at 693, quoting, Montana v. Blackfeet Tribe, 471 U.S. 759. Any ambiguity created by Congress' failure to explicitly address the issue of state taxation over Indian owned fee lands must be resolved in favor of the Indians and against state taxation.

[3] There is no question that the land at issue in Lummi is located within the boundaries of the Lummi Indian Reservation and, therefore within Indian country. See 18 U.S.C. § 1151. In Indian country, federal policies and statutes do not distinguish between tribal property held in fee as opposed to that held in trust. See, e.g., Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461, et seq.; Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). See generally F. Cohen, Handbook of Federal Indian Law, 34-38, 520 (1982 ed.). Moreover, this Court recently refused to draw such a distinction absent an explicit congressional directive. See Oklahoma State Tax Comm'n v. Sac and Fox Nation, 508 U.S. ___, ___, 113 S.Ct. 1985, 1992, 124 L.Ed.2d 30 (1993) ("Additional congressional enactments support our conclusion that the McClanahan presumption against state taxing authority (continued...)

The Court in Yakima was correct when it reiterated and applied its longstanding approach to tribal-state taxation issues by following the per se rule precluding state taxing jurisdiction over Indian land absent express congressional consent. The Court has recognized that special rules apply in the area of Indian taxation which mandate that the courts decline "to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear. Montana v. Blackfeet Tribe, 471 U.S. [at] 765 . . .'" Yakima, 112 S.Ct. at 688. See Mescalero Apache v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); California v. Cabazon, supra, 480 U.S. at 215 n.17.[4]

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[3](...continued)
applies to all Indian country . . .." There is, therefore, no basis to support the distinction the Lummi court decision draws between tribally owned fee and trust land.

[4] In Mescalero Apache v. Jones, the Court held that:

> in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148.

In Cabazon, the Court was considering the

application of state gaming laws to tribal gaming operations. In this regulatory context the Court found that the rule precluding state jurisdiction over tribes was not an "inflexible per se rule." Cabazon, 480 U.S. at 215. However, the Court noted that in the special area of state taxation of Indian tribes there is a per se rule which is inflexible and is not subject to a rebalancing of interests in every case. Without question, the per se rule precludes state taxing jurisdiction in the absence of explicit and unambiguous congressional consent. Id. at 215 n.17.

Unlike the Ninth Circuit in Lummi, the Yakima Court did not deviate from this per se rule; rather it found within the language of the Burke Act proviso, 25 U.S.C. § 349, the necessary explicit congressional consent to state taxation of Indian land which was patented in fee pursuant to the terms and conditions of the General Allotment Act.

The Court recently considered the State of Oklahoma's claim that its authority to tax Indian earnings and vehicles was only limited by formal reservation boundaries. See Oklahoma Tax Comm'n. v. Sac and Fox Nation, 113 S.Ct. 1985. While finding that "Indian country" not "Indian reservations" established the limits of state taxing jurisdiction, the Court once again reaffirmed the per se rule applicable to tribal-state taxation issues:

> Although "exemptions from tax laws should, as a general rule, be clearly expressed," McClanahan, 411 U.S., at 176, the tradition of Indian sovereignty requires that the rule be reversed when a state attempts to assert tax jurisdiction

See also Bryan v. Itasca County, 426 U.S. 373 (exclusion of state from the taxation of Indian property is not dependent upon the trust status of the property).

The Ninth Circuit believed that the Yakima Court's apparent approval of the logic propounded in Goudy v. Meath, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906) led to the "virtually inescapable conclusion that the Lummi land is taxable if it is alienable." Lummi, 5 F.3d at 1358.[5] The inaccuracy of that court's belief becomes evident with a review of the Yakima Court's evaluation of the validity of the application of the State of Washington's excise tax on the sale of Indian owned fee lands. The Court did concede that the logic propounded in Goudy could lead to the application of the full spectrum of state property tax laws:

> over an Indian tribe or tribal members [in Indian country] . . ..
>
> * * *
>
> [O]ur cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the McClanahan presumption counsels against finding such jurisdiction.

113 S.Ct. at 1991-92.

[5] Even the Goudy Court itself appears to have recognized that the ambiguities in the language of § 5 of the General Allotment Act did not lead "inescapably" to the conclusion that Indian owned fee land was taxable. See Yakima, 112 S.Ct. at 691, quoting from Goudy v. Meath, 203 U.S. at 149.

> [i]t does not exceed the bounds of permissible construction to interpret "taxation of land" as including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with Goudy's emphasis upon the consequences of alienability, which underlay the Burke Act proviso.

Yakima, 112 S.Ct. at 693 (emphasis added). However, the Court recognized that it was the Burke Act proviso, not the consequences of alienability that provided the states with the authority to tax -- but only to the extent the Act clearly and unambiguously authorized the type of tax being imposed.[6] And, as the Court held, Congress only authorized a tax on land, not on the proceeds from the sale of land, in the Burke Act proviso:

> It is quite reasonable to say . . . that though the object of the sale here is land, that does not make land the object of the

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[6] Absent an explicit congressional declaration establishing the scope and nature of the states' authority to tax alienable Indian land owned in fee, the inherent ambiguities in the statutory language allowing for alienation must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112 S.Ct. at 693. Applying this "deeply rooted principle of Indian jurisprudence," id., alienability, in and of itself, cannot be construed to authorize state taxation to the detriment of the Indians. And, the Court need look no further than the history of the General Allotment Act to determine that state taxation is a detriment to Indian land holdings. See Yakima, 112 S.Ct. 697-96 (Blackmun, J., concurring in part and dissenting in part).

> tax, and hence does not invoke the Burke Act proviso.
>
> * * *
>
> The short of the matter is that the General Allotment Act [in the Burke Act proviso] explicitly authorizes only "taxation of . . . land" not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

Yakima, 112 S.Ct. at 693-94 (emphasis added). If the Lummi court's interpretation of Yakima was correct, it would not have been "eminently reasonable" for the Yakima Court to refuse to sustain the State's excise tax.[7]

The Treaty of Point Elliot, pursuant to which the Lummi lands were allotted and later sold, see Lummi, 5 F.3d at 1356-57, is devoid of any reference or explicit consent to state taxation. This Court must grant the Tribe's Petition for Writ of Certiorari to alleviate the confusion created by the Ninth Circuit's misinterpretation and misapplication of Yakima to Lummi land allotted

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[7] Nor would it have been necessary for Congress to enact the Burke Act proviso or for the Yakima Court to analyze the proviso. Moreover, there would not have been any basis for the Court's decision invalidating the application of Washington's excise tax on the sale of Indian owned fee land.

under the Treaty; and to unequivocally reaffirm that states cannot tax land patented in fee pursuant to a statute other than the General Allotment Act unless the applicable statute also contains an explicit congressional grant of taxing authority to the states.

B. Modern Federal Policies Protect Lands Owned by an Indian Tribe from Encumbrance Absent Explicit Tribal Consent.

In 1934, Congress mandated that lands owned by or for the benefit of an Indian tribe, cannot be encumbered absent the expressed consent of the Tribe itself. In the Indian Reorganization Act, 25 U.S.C. 461 et seq. (hereafter the "IRA"), Congress provided that:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . ..

25 U.S.C. § 476 (emphasis added).[8] At the same time,

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[8] Neither the Yakima Indian Nation or the Lummi Indian Tribe is organized pursuant to the Indian Reorganization Act. The Blackfeet Tribe, amicus herein, is organized pursuant to the IRA. The Tribe's constitution, adopted in accordance with section 476, was approved by the Secretary of Interior on December 13, 1935. Article VI, Section 1 (c) provides that:

(continued...)

Congress initiated a policy to stop further allotments, freeze the trust status of allotted but not yet patented lands, and repurchase previously alienated Indian lands to rebuild the tribal land base. See 25 U.S.C. §§ 461-65; Yakima, 112 S.Ct. at 686, 698 n.6 (Blackmun J., concurring in part and dissenting in part). Congress' explicit reversal of these allotment-era policies together with the requirement of tribal consent to any encumbrance institutes a "modern" statutory policy of protecting all lands owned by an Indian tribe, whether in fee or in trust, from any encumbrance absent the consent of the tribe.

The Yakima Court, however, found that remnants of the General Allotment Act policy survived Congress' reversal of allotment-era policies. See Yakima 112 S.Ct.

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*(...continued)

> The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States . . .
>
> * * *
>
> (c) To prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets, without the consent of the Tribe.

The Blackfeet Reservation is located in Montana within and subject to the jurisdiction of the Ninth Circuit. That court's decision in Lummi is so broad that, if not reviewed and reversed by this Court, it will subsume and nullify the Tribe's power to prevent encumbrances on land owned in fee by the Tribe pursuant to Section 16 of the IRA and the Tribe's Constitution.

at 692. Specific General Allotment Act provisions may still continue to apply to parcels of land allotted under that Act. But, the modern federal policies set forth in the IRA and later congressional enactments, including the protections and prohibitions against encumbrances of land owned by Indian tribes, are explicitly directed toward preserving, protecting and enhancing the tribal land base. Those very explicit protections can only be obstructed by the remnants of the General Allotment Act to the extent Congress, as it did in the Burke Act proviso, explicitly provided the states with the authority to tax Indian land.[9] But the protections provided all tribal land pursuant to 25 U.S.C. § 476, in conjunction with the policies of reacquisition of tribal land promoted in the IRA, survive in all other respects and prohibit the states from encumbering any land owned by an Indian tribe, no matter how acquired.

The protections afforded tribally owned fee land under the IRA were recently affirmed by the Alaska Supreme Court In The Matter of 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome, Alaska, 780 P.2d 363 (Ak. 1989). In that case, the City of Nome initiated a foreclosure proceeding in rem on two parcels of land purchased and owned in fee simple by "NEC, a group of Alaska Natives . . . organized

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[9] The constitutions of most IRA tribes, including the Blackfeet Tribe, specifically provide that the power of the tribe to prevent sales of and encumbrances on lands owned by the tribe is limited by Congress' plenary authority over Indian affairs. See, e.g., Constitution of the Blackfeet Tribe, Article VI, Section 1, quoted above at n.5. Therefore, to the extent Congress approved the application of state taxes on particular parcels of land in the Burke Act, that congressional grant limits the scope of the protections afforded in the Tribe's constitution.

under the IRA." Id. at 364, 365 n.3. The court held that "Section 16 of the IRA bars the City from foreclosing on NEC lands without the consent of NEC." Id. at 367. In reaching its holding the court found that the purpose of § 16 of the IRA, 25 U.S.C. § 476, was:

> to stop the erosion of the tribal land base in whatever form that erosion took.
>
> * * *
>
> [A]pplication of the provision to foreclosure proceedings will further that purpose.

Matter of City of Nome, Alaska, 780 P.2d at 367.

The Ninth Circuit failed to consider the impact of its overly broad decision on modern federal statutes and tribal enactments protecting tribally owned land from encumbrances. The court's decision is in direct conflict with the provisions of the IRA, and with the recent decision of the Supreme Court of the State of Alaska, a court within the territorial jurisdiction of the Ninth Circuit. This Court must issue the writ of certiorari to resolve these conflicts.

C. The Lands at Issue in Lummi are Owned by the Lummi Indian Tribe and Cannot be Alienated Without Federal Consent.

The Lummi court's reliance on alienation as the sole basis for upholding state taxation is fatally undermined because the land at issue is owned by the Lummi Indian Tribe and is not alienable without federal consent. See Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177. Tribal consent also is required. See IRA, 25 U.S.C. § 476, discussed

supra.[10]

The Ninth Circuit erroneously concluded that alienability alone equates to tax liability, forcing the court to enter into a clearly flawed analysis of the applicability of the restraints on alienation imposed on Indian tribes under 25 U.S.C. § 177. As discussed in the Petition at 15-18, the clear language of that statute prohibits any "conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians . . .." 25 U.S.C. § 177. Only by appropriate congressional action can the statute's all-encompassing restrictions be modified or removed. See generally Petition at 16-17.[11] The Ninth

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[10] That the Yakima Court did not address the federal statutory restraints on alienation is not surprising. Contrary to the Ninth Circuit's interpretation, the Yakima Court did not rely on the General Allotment Act's waiver of the restraints on alienation as the grounds for upholding state taxation of the land. Rather, it was Congress' explicit grant in the Burke Act proviso that made the land, and only the land, taxable. See Yakima, 112 S.Ct. at 693-94.

[11] The restraints on an Indian tribe's ability to alienate land does not preclude Congress from subjecting those lands to various forms of state taxation, so long as Congress does so in clear and unambiguous terms. For example, Congress granted the states the authority to tax minerals derived from restricted Indian lands in the 1924 Mineral Leasing Act, Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398. See generally Montana v. Blackfeet Tribe, 471 U.S. 759. Moreover, the notion that alienation mandates taxation contradicts public land law policy prior to the enactment of the Federal Land Policy Management Act, Act of Oct. 21, 1976, 90 Stat. 2744, as amended,

(continued...)

Circuit's attempt to overcome the restrictions on alienation found in 25 U.S.C. § 177 "reduces ultimately to the proposition," cf. Yakima, 112 S.Ct. at 690, that the restraints against alienation of land by an Indian tribe were impliedly waived by allotment-era statutes that provided individual Indians with the authority to sell their land.[12] Implied waivers are not only strongly disfavored,

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[11](...continued)
43 U.S.C. § 1701, et seq. Pre-FLPMA public lands were subject to alienation under a variety of entry and homestead statutes. But, those lands were not subject to taxation by the states. (FLPMA prohibits to a substantial degree the Federal Government's authority to alienate the public lands.)

[12] Just as it is in Congress' hands to address the continuing viability of the General Allotment Act in light of the objectives of the Indian Reorganization Act, see generally Yakima, 112 S.Ct. at 692, it is within Congress' bailiwick, not the courts, to address the viability of the restrictions imposed under 25 U.S.C. §177 in light of later congressional policies. The Ninth Circuit, however, has seen fit to limit § 177's applicability to "pre-modern" land acquisitions by an Indian tribe. See Lummi, 5 F.3d at 1358-59. In creating this heretofore unheard of limitation on the protections afforded under 25 U.S.C. § 177, the court conveniently failed to recognize that the policies encapsulated in the Non-Intercourse Act were reinvigorated in the IRA, 25 U.S.C. § 476, and later federal Indian policies.

The Ninth Circuit also claims that prior alienation of Indian land implicitly repeals protections afforded Indian tribes when they acquire previously allotted and sold land. See Lummi, 5 F.3d at 1359. In carrying forth these (continued...)

see Yakima, 112 S.Ct. at 690, quoting, Pasodas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936), they are antithetical to the principle:

> deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S., at 766, 105 S.Ct., at 2403.

Yakima, 112 S.Ct. at 693.

The foundation of the Ninth Circuit's decision upholding state taxation of the Lummi Tribe's fee land -- alienability -- crumbles without an implied waiver of the restrictions imposed under 25 U.S.C. § 177. The writ of certiorari should be issued to make it clear that Congress has not impliedly limited the scope of protections afford all tribal land under 25 U.S.C. § 177.

CONCLUSION

As Judge Beezer noted in his dissent:

---

[12](...continued)
congressionally repudiated allotment-era policies, the court fails to recognize that those policies contemplated the complete divestiture of tribal land holdings and the ultimate destruction of the tribes themselves. See generally C. Wilkinson, American Indians, Time and the Law, 19-23 (1967). It is, therefore, improbable that Congress even considered the impact of allotment and alienation on land acquisitions by Indian tribes.

> There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future.

Lummi, 5 F.3d. at 1360 (Beezer J., dissenting). The apparent simplicity offered by the Ninth Circuit's decision in reality offers nothing more than confusion and conflict. This Court should issue the writ of certiorari and resolve these conflicts in a manner consistent with the per se rule applicable to tribal-state taxation issues.

Respectfully submitted this 1st day of June, 1994

/s/

Jeanne S. Whiteing
Counsel of Record
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Blackfeet Tribe of Indians

APPENDIX A

LUMMI INDIAN BUSINESS COUNCIL
1503 E Street, P.O. Box 5746, Bellingham, WA 98227 (206)647-0234
DEPARTMENT Reservation Attorney EXT

May 25, 1994

Ms. Jeanne S. Whiteing
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, CO 80302

RE: Lummi Indian Tribe v. Whatcom County

Dear Ms. Whiteing:

In response to your letter of May 25, the Lummi Indian Tribe is pleased to consent to the filing of an amicus curiae brief by the Blackfeet Indian Tribe in support of the Lummi Tribe's Petition for Writ of Certiorari in the above-referenced case.

Very truly yours,

OFFICE OF THE RESERVATION ATTORNEY

By
HARRY L. JOHNSEN

HLJ:slw

cc: LIT

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JUN 1 1994

No. 93-1742

(4)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JUN 17 PAGE

LUMMI INDIAN TRIBE,
PETITIONER
vs.
WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,
RESPONDENTS.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* AND BRIEF OF *AMICUS CURIAE* BLACKFEET TRIBE OF INDIANS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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June 1, 1994

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Jeanne S. Whiteing
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June 1, 1994

Counsel for *Amicus Curiae*
Blackfeet Tribe of Indians

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Blackfeet Tribe of Indians of the Blackfeet Reservation, Montana (the "Tribe"), through its attorneys and pursuant to Supreme Court Rule 37.4, respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petition for Writ of Certiorari filed on behalf of the Lummi Indian Tribe.* A copy of the letter by which counsel for the Petitioner has consented to the Tribe's participation as amicus curiae is attached at Appendix A. Counsel for the Respondent Whatcom County, Washington has told counsel for the Petitioner that the Respondent will not consent to the participation of any amicus. The Tribe hereby files this motion with the belief that the nature of the Tribe's interest, set forth below, will provide this Court with a unique perspective from which to review the issues raised in this proceeding.

DISCUSSION

The Tribe is a federally recognized tribe organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461 et seq. The Tribe owns land in fee within the boundaries of the Blackfeet Reservation which was patented pursuant to statutes other than the General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq.

---

* The Petition was filed with the Court on May 2, 1994. Counsel for Petitioner was informed that the Whatcom County Prosecuting Attorney's Office received the Petition on that same day. Pursuant to Supreme Court Rule 37.2, this Motion and Amicus Brief must be filed by June 1, 1994. See also S.Ct. Rule 29.2.

In 1986, the Tribe filed suit in the United States District Court for the District of Montana challenging the imposition of state property taxes against real property owned in fee by the Tribe within exterior boundaries of the Blackfeet Indian Reservation. See Blackfeet Tribe v. LaFaver, No. CV-86-23-GF (D. Mont.). The Tribe, the State of Montana and the two affected counties negotiated a resolution of that case in which the State parties agreed to return taxes previously collected on the tribally owned properties, to cancel all entries of property tax delinquencies or liens against the tribally owned properties, and to discontinue assessing or demanding payment of property taxes attributable to any real property solely owned by the Tribe or attributable to its ownership interest in a parcel of property.

The question presented in the Petition for Writ of Certiorari is an issue this Court left unanswered when it decided County of Yakima v. Yakima Indian Nation, 502 U.S. ___, ___, 112 S.Ct. 683, 694, 116 L.Ed.2d 687 (1992): whether lands owned by an Indian tribe and patented in fee under statutes other than the General Allotment Act, 25 U.S.C. § 331, et seq., are subject to a state ad valorem tax absent an unmistakably clear congressional grant of such taxing authority to the states. That issue directly affects and impacts certain fee lands owned by the Tribe as well as the legitimacy of the law and policy that is the foundation of the Tribe's Agreement with the State parties. The Tribe and the State parties have relied on this Agreement since its execution in January, 1987. The Tribe is vitally concerned that the protections afforded its property under the Agreement continue in full force and effect consistent with federal law and policy. Those laws and policies are directly at issue in Lummi Indian Tribe v. Whatcom County, Washington, Case No. 93-1742 (Petition filed May 2, 1994), and the protections afforded the Tribe are threatened should the decision of the United States Court

of Appeals for the Ninth Circuit in Lummi Indian Tribe v. Whatcom County Washington, et al., 5 F.3rd 1355 (9th Cir. 1993) be allowed to stand.

WHEREFORE, the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, respectfully requests that this Court GRANT its Motion to File Brief Amicus Curiae in Support of the Petition for Writ of Certiorari.

Respectfully submitted,

/s/

Jeanne S. Whiteing
Counsel of Record
Tod J. Smith
Whiteing & Thompson
1136 Pearl Street, Suite 203
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(303) 444-2549

Counsel for Amicus Curiae
Blackfeet Tribe of Indians

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INTEREST OF AMICUS CURIAE

The interests of the Blackfeet Tribe of Indians of the Blackfeet Reservation (the "Tribe") are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Petition for Writ of Certiorari and are incorporated herein by reference.

STATEMENT OF THE CASE

The background, nature and disposition of the proceedings before the United States Court of Appeals for the Ninth Circuit are set forth in the Petition for Writ of Certiorari (hereafter cited as "Petition at ___") filed by the Lummi Indian Tribe. See Petition at 2-6.

SUMMARY OF ARGUMENT

Supreme Court Rule 10.1(c) indicates that a Petition will be considered when:

> a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case not only fulfills both requirements, but has ramifications throughout Indian country because numerous Indian tribes, including the Blackfeet Tribe, have acquired and currently own land in fee that was not originally patented pursuant to the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq.

In County of Yakima v. Yakima Indian Nation, 502 U.S. ___, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(hereafter "Yakima"), this Court left for later resolution the issue of whether a state can impose an ad valorem tax on Indian owned land that was patented in fee pursuant to statutes other than the General Allotment Act. 112 S.Ct. at 694. That issue is presented in the Lummi Tribe's Petition with respect to land acquired and owned in fee by that Tribe. In resolving that issue in favor of state taxation, the Ninth Circuit held that the statute under which the land was allotted did not matter, the sole determining factor being whether the land was alienable. See Lummi Indian Tribe v. Whatcom County, Washington, et al., 5 F.3d 1355, 1359 (9th Cir. 1993) (hereafter "Lummi") ("We hold that . . . [b]ecause the parcels are alienable, they are also taxable."). This holding is in direct conflict with this Court's analysis in Yakima as well as a long line of cases which require that Congress make its intent to tax Indian land unmistakably clear. It is now incumbent upon this Court to issue the writ of certiorari and address the issue it left unanswered in Yakima by reversing the Ninth Circuit and, once again "lay[ing] to rest any doubt . . . that . . . taxation [of Indian land] is not permissible absent [explicit] congressional consent." State of California v. Cabazon Band of Indians, 480 U.S. 202, 215 n. 17, 107 S.Ct. 1083, 1091 n.17, 94 L.Ed.2d 244 (1987).

REASONS THE WRIT SHOULD BE ISSUED

A. The Ninth Circuit's Decision Ignores the Analysis this Court Applied in Yakima Which Requires an Unmistakably Clear Congressional Grant to the States of the Authority to Tax Indian Land.

In Yakima this Court asked, but did not directly answer, whether Indian owned fee land alienated pursuant to statutes other than the General Allotment Act was subject to state taxation. Yakima, 112 S.Ct. at

694.[1] But the Court's analysis in Yakima leads to the answer to the question posed: while Congress may allow an Indian to alienate land, a state cannot tax that land absent specific congressional authorization explicitly providing for and defining the extent and nature of the state's taxing authority. This analysis follows what has oft times been referred as the per se rule of state taxation of Indian tribes: Indian property is never subject to state taxation absent explicit congressional authorization. See Yakima, 112 S.Ct. at 687-88.[2] While the Court

---

[1] The Court also did not directly address the effects of an Indian tribe subsequently acquiring land previously alienated by individual Indians pursuant to the terms of the General Allotment Act.

[2] An explicit congressional declaration is required because "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . .' Choate v. Trapp, 224 U.S. [665,] at 675, 56 L.Ed. 941, 32 S.Ct. 565 [1912]." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 n.4, 105 S.Ct. 2399, 2403 n.4, 85 L.Ed.2d 753 (1985). Such a liberal construction required the continuation of the tax exemption enjoyed by Indian trust patent holders when their land was patented in fee, absent a congressional declaration to the contrary. The Burke Act, Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. § 349, included such an explicit declaration with respect to lands patented under the General Allotment Act. See Yakima, 112 S.Ct. at 694.

Moreover, the courts must construe the statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112

(continued...)

recognized that the Indian owned land was implicitly subject to state taxation only if it was alienable, it only upheld the State of Washington's authority to impose its ad valorem tax on Indian land owned in fee, upon its determination that Congress explicitly authorized such a tax in the Burke Act. The Lummi decision directly conflicts with this Court's analysis in Yakima, because the Lummi court upheld state taxation based solely on the fact that the land had, prior to its acquisition by the Lummi Tribe, been allotted under the Treaty of Point Elliot and, at some later point, sold.[3]

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[2](...continued)
S.Ct. at 693, quoting, Montana v. Blackfeet Tribe, 471 U.S. 759. Any ambiguity created by Congress' failure to explicitly address the issue of state taxation over Indian owned fee lands must be resolved in favor of the Indians and against state taxation.

[3] There is no question that the land at issue in Lummi is located within the boundaries of the Lummi Indian Reservation and, therefore within Indian country. See 18 U.S.C. § 1151. In Indian country, federal policies and statutes do not distinguish between tribal property held in fee as opposed to that held in trust. See, e.g., Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461, et seq.; Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). See generally F. Cohen, Handbook of Federal Indian Law, 34-38, 520 (1982 ed.). Moreover, this Court recently refused to draw such a distinction absent an explicit congressional directive. See Oklahoma State Tax Comm'n v. Sac and Fox Nation, 508 U.S. ___, ___, 113 S.Ct. 1985, 1992, 124 L.Ed.2d 30 (1993) ("Additional congressional enactments support our conclusion that the McClanahan presumption against state taxing authority
(continued...)

The Court in Yakima was correct when it reiterated and applied its longstanding approach to tribal-state taxation issues by following the per se rule precluding state taxing jurisdiction over Indian land absent express congressional consent. The Court has recognized that special rules apply in the area of Indian taxation which mandate that the courts decline "to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear. Montana v. Blackfeet Tribe, 471 U.S. [at] 765 . . .." Yakima, 112 S.Ct. at 688. See Mescalero Apache v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); California v. Cabazon, supra, 480 U.S. at 215 n.17.[4]

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[3](...continued)
applies to all Indian country . . .." There is, therefore, no basis to support the distinction the Lummi court decision draws between tribally owned fee and trust land.

[4] In Mescalero Apache v. Jones, the Court held that:

> in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148.

In Cabazon, the Court was considering the

application of state gaming laws to tribal gaming operations. In this regulatory context the Court found that the rule precluding state jurisdiction over tribes was not an "inflexible per se rule." Cabazon, 480 U.S. at 215. However, the Court noted that in the special area of state taxation of Indian tribes there is a per se rule which is inflexible and is not subject to a rebalancing of interests in every case. Without question, the per se rule precludes state taxing jurisdiction in the absence of explicit and unambiguous congressional consent. Id. at 215 n.17.

Unlike the Ninth Circuit in Lummi, the Yakima Court did not deviate from this per se rule; rather it found within the language of the Burke Act proviso, 25 U.S.C. § 349, the necessary explicit congressional consent to state taxation of Indian land which was patented in fee pursuant to the terms and conditions of the General Allotment Act.

The Court recently considered the State of Oklahoma's claim that its authority to tax Indian earnings and vehicles was only limited by formal reservation boundaries. See Oklahoma Tax Comm'n. v. Sac and Fox Nation, 113 S.Ct. 1985. While finding that "Indian country" not "Indian reservations" established the limits of state taxing jurisdiction, the Court once again reaffirmed the per se rule applicable to tribal-state taxation issues:

> Although "exemptions from tax laws should, as a general rule, be clearly expressed," McClanahan, 411 U.S., at 176, the tradition of Indian sovereignty requires that the rule be reversed when a state attempts to assert tax jurisdiction

See also Bryan v. Itasca County, 426 U.S. 373 (exclusion of state from the taxation of Indian property is not dependent upon the trust status of the property).

The Ninth Circuit believed that the Yakima Court's apparent approval of the logic propounded in Goudy v. Meath, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906) led to the "virtually inescapable conclusion that the Lummi land is taxable if it is alienable." Lummi, 5 F.3d at 1358.[5] The inaccuracy of that court's belief becomes evident with a review of the Yakima Court's evaluation of the validity of the application of the State of Washington's excise tax on the sale of Indian owned fee lands. The Court did concede that the logic propounded in Goudy could lead to the application of the full spectrum of state property tax laws:

> over an Indian tribe or tribal members [in Indian country] . . ..
>
> * * *
>
> [O]ur cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the McClanahan presumption counsels against finding such jurisdiction.

113 S.Ct. at 1991-92.

[5] Even the Goudy Court itself appears to have recognized that the ambiguities in the language of § 5 of the General Allotment Act did not lead "inescapably" to the conclusion that Indian owned fee land was taxable. See Yakima, 112 S.Ct. at 691, quoting from Goudy v. Meath, 203 U.S. at 149.

> [i]t does not exceed the bounds of permissible construction to interpret "taxation of land" as including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with Goudy's emphasis upon the consequences of alienability, which underlay the Burke Act proviso.

Yakima, 112 S.Ct. at 693 (emphasis added). However, the Court recognized that it was the Burke Act proviso, not the consequences of alienability that provided the states with the authority to tax -- but only to the extent the Act clearly and unambiguously authorized the type of tax being imposed.[6] And, as the Court held, Congress only authorized a tax on land, not on the proceeds from the sale of land, in the Burke Act proviso:

> It is quite reasonable to say . . . that though the object of the sale here is land, that does not make land the object of the

---

[6] Absent an explicit congressional declaration establishing the scope and nature of the states' authority to tax alienable Indian land owned in fee, the inherent ambiguities in the statutory language allowing for alienation must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112 S.Ct. at 693. Applying this "deeply rooted principle of Indian jurisprudence," id., alienability, in and of itself, cannot be construed to authorize state taxation to the detriment of the Indians. And, the Court need look no further than the history of the General Allotment Act to determine that state taxation is a detriment to Indian land holdings. See Yakima, 112 S.Ct. 697-96 (Blackmun, J., concurring in part and dissenting in part).

> tax, and hence does not invoke the Burke Act proviso.
>
> * * *
>
> The short of the matter is that the General Allotment Act [in the Burke Act proviso] explicitly authorizes only "taxation of . . . land" not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

Yakima, 112 S.Ct. at 693-94 (emphasis added). If the Lummi court's interpretation of Yakima was correct, it would not have been "eminently reasonable" for the Yakima Court to refuse to sustain the State's excise tax.[7]

The Treaty of Point Elliot, pursuant to which the Lummi lands were allotted and later sold, see Lummi, 5 F.3d at 1356-57, is devoid of any reference or explicit consent to state taxation. This Court must grant the Tribe's Petition for Writ of Certiorari to alleviate the confusion created by the Ninth Circuit's misinterpretation and misapplication of Yakima to Lummi land allotted

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[7] Nor would it have been necessary for Congress to enact the Burke Act proviso or for the Yakima Court to analyze the proviso. Moreover, there would not have been any basis for the Court's decision invalidating the application of Washington's excise tax on the sale of Indian owned fee land.

under the Treaty; and to unequivocally reaffirm that states cannot tax land patented in fee pursuant to a statute other than the General Allotment Act unless the applicable statute also contains an explicit congressional grant of taxing authority to the states.

B. Modern Federal Policies Protect Lands Owned by an Indian Tribe from Encumbrance Absent Explicit Tribal Consent.

In 1934, Congress mandated that lands owned by or for the benefit of an Indian tribe, cannot be encumbered absent the expressed consent of the Tribe itself. In the Indian Reorganization Act, 25 U.S.C. 461 et seq. (hereafter the "IRA"), Congress provided that:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . ..

25 U.S.C. § 476 (emphasis added).[8] At the same time,

---

[8] Neither the Yakima Indian Nation or the Lummi Indian Tribe is organized pursuant to the Indian Reorganization Act. The Blackfeet Tribe, amicus herein, is organized pursuant to the IRA. The Tribe's constitution, adopted in accordance with section 476, was approved by the Secretary of Interior on December 13, 1935. Article VI, Section 1 (c) provides that:

(continued...)

Congress initiated a policy to stop further allotments, freeze the trust status of allotted but not yet patented lands, and repurchase previously alienated Indian lands to rebuild the tribal land base. See 25 U.S.C. §§ 461-65; Yakima, 112 S.Ct. at 686, 698 n.6 (Blackmun J., concurring in part and dissenting in part). Congress' explicit reversal of these allotment-era policies together with the requirement of tribal consent to any encumbrance institutes a "modern" statutory policy of protecting all lands owned by an Indian tribe, whether in fee or in trust, from any encumbrance absent the consent of the tribe.

The Yakima Court, however, found that remnants of the General Allotment Act policy survived Congress' reversal of allotment-era policies. See Yakima 112 S.Ct.

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[8](...continued)

> The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States . .
>
> .
>
> * * *
>
> (c) To prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets, without the consent of the Tribe.

The Blackfeet Reservation is located in Montana within and subject to the jurisdiction of the Ninth Circuit. That court's decision in Lummi is so broad that, if not reviewed and reversed by this Court, it will subsume and nullify the Tribe's power to prevent encumbrances on land owned in fee by the Tribe pursuant to Section 16 of the IRA and the Tribe's Constitution.

at 692. Specific General Allotment Act provisions may still continue to apply to parcels of land allotted under that Act. But, the modern federal policies set forth in the IRA and later congressional enactments, including the protections and prohibitions against encumbrances of land owned by Indian tribes, are explicitly directed toward preserving, protecting and enhancing the tribal land base. Those very explicit protections can only be obstructed by the remnants of the General Allotment Act to the extent Congress, as it did in the Burke Act proviso, explicitly provided the states with the authority to tax Indian land.[9] But the protections provided all tribal land pursuant to 25 U.S.C. § 476, in conjunction with the policies of reacquisition of tribal land promoted in the IRA, survive in all other respects and prohibit the states from encumbering any land owned by an Indian tribe, no matter how acquired.

The protections afforded tribally owned fee land under the IRA were recently affirmed by the Alaska Supreme Court In The Matter of 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome, Alaska, 780 P.2d 363 (Ak. 1989). In that case, the City of Nome initiated a foreclosure proceeding in rem on two parcels of land purchased and owned in fee simple by "NEC, a group of Alaska Natives . . . organized

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[9] The constitutions of most IRA tribes, including the Blackfeet Tribe, specifically provide that the power of the tribe to prevent sales of and encumbrances on lands owned by the tribe is limited by Congress' plenary authority over Indian affairs. See, e.g., Constitution of the Blackfeet Tribe, Article VI, Section 1, quoted above at n.5. Therefore, to the extent Congress approved the application of state taxes on particular parcels of land in the Burke Act, that congressional grant limits the scope of the protections afforded in the Tribe's constitution.

under the IRA." Id. at 364, 365 n.3. The court held that "Section 16 of the IRA bars the City from foreclosing on NEC lands without the consent of NEC." Id. at 367. In reaching its holding the court found that the purpose of § 16 of the IRA, 25 U.S.C. § 476, was:

> to stop the erosion of the tribal land base in whatever form that erosion took.
>
> * * *
>
> [A]pplication of the provision to foreclosure proceedings will further that purpose.

Matter of City of Nome, Alaska, 780 P.2d at 367.

The Ninth Circuit failed to consider the impact of its overly broad decision on modern federal statutes and tribal enactments protecting tribally owned land from encumbrances. The court's decision is in direct conflict with the provisions of the IRA, and with the recent decision of the Supreme Court of the State of Alaska, a court within the territorial jurisdiction of the Ninth Circuit. This Court must issue the writ of certiorari to resolve these conflicts.

C. The Lands at Issue in Lummi are Owned by the Lummi Indian Tribe and Cannot be Alienated Without Federal Consent.

The Lummi court's reliance on alienation as the sole basis for upholding state taxation is fatally undermined because the land at issue is owned by the Lummi Indian Tribe and is not alienable without federal consent. See Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177. Tribal consent also is required. See IRA, 25 U.S.C. § 476, discussed

supra.[10]

The Ninth Circuit erroneously concluded that alienability alone equates to tax liability, forcing the court to enter into a clearly flawed analysis of the applicability of the restraints on alienation imposed on Indian tribes under 25 U.S.C. § 177. As discussed in the Petition at 15-18, the clear language of that statute prohibits any "conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians . . .." 25 U.S.C. § 177. Only by appropriate congressional action can the statute's all-encompassing restrictions be modified or removed. See generally Petition at 16-17.[11] The Ninth

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[10] That the Yakima Court did not address the federal statutory restraints on alienation is not surprising. Contrary to the Ninth Circuit's interpretation, the Yakima Court did not rely on the General Allotment Act's waiver of the restraints on alienation as the grounds for upholding state taxation of the land. Rather, it was Congress' explicit grant in the Burke Act proviso that made the land, and only the land, taxable. See Yakima, 112 S.Ct. at 693-94.

[11] The restraints on an Indian tribe's ability to alienate land does not preclude Congress from subjecting those lands to various forms of state taxation, so long as Congress does so in clear and unambiguous terms. For example, Congress granted the states the authority to tax minerals derived from restricted Indian lands in the 1924 Mineral Leasing Act, Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398. See generally Montana v. Blackfeet Tribe, 471 U.S. 759. Moreover, the notion that alienation mandates taxation contradicts public land law policy prior to the enactment of the Federal Land Policy Management Act, Act of Oct. 21, 1976, 90 Stat. 2744, as amended,

(continued...)

Circuit's attempt to overcome the restrictions on alienation found in 25 U.S.C. § 177 "reduces ultimately to the proposition," cf. Yakima, 112 S.Ct. at 690, that the restraints against alienation of land by an Indian tribe were impliedly waived by allotment-era statutes that provided individual Indians with the authority to sell their land.[12] Implied waivers are not only strongly disfavored,

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[11](...continued)
43 U.S.C. § 1701, et seq. Pre-FLPMA public lands were subject to alienation under a variety of entry and homestead statutes. But, those lands were not subject to taxation by the states. (FLPMA prohibits to a substantial degree the Federal Government's authority to alienate the public lands.)

[12] Just as it is in Congress' hands to address the continuing viability of the General Allotment Act in light of the objectives of the Indian Reorganization Act, see generally Yakima, 112 S.Ct. at 692, it is within Congress' bailiwick, not the courts, to address the viability of the restrictions imposed under 25 U.S.C. §177 in light of later congressional policies. The Ninth Circuit, however, has seen fit to limit § 177's applicability to "pre-modern" land acquisitions by an Indian tribe. See Lummi, 5 F.3d at 1358-59. In creating this heretofore unheard of limitation on the protections afforded under 25 U.S.C. § 177, the court conveniently failed to recognize that the policies encapsulated in the Non-Intercourse Act were reinvigorated in the IRA, 25 U.S.C. § 476, and later federal Indian policies.

The Ninth Circuit also claims that prior alienation of Indian land implicitly repeals protections afforded Indian tribes when they acquire previously allotted and sold land. See Lummi, 5 F.3d at 1359. In carrying forth these
(continued...)

see Yakima, 112 S.Ct. at 690, quoting, Pasodas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936), they are antithetical to the principle:

> deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S., at 766, 105 S.Ct., at 2403.

Yakima, 112 S.Ct. at 693.

The foundation of the Ninth Circuit's decision upholding state taxation of the Lummi Tribe's fee land -- alienability -- crumbles without an implied waiver of the restrictions imposed under 25 U.S.C. § 177. The writ of certiorari should be issued to make it clear that Congress has not impliedly limited the scope of protections afford all tribal land under 25 U.S.C. § 177.

CONCLUSION

As Judge Beezer noted in his dissent:

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[12](...continued)
congressionally repudiated allotment-era policies, the court fails to recognize that those policies contemplated the complete divestiture of tribal land holdings and the ultimate destruction of the tribes themselves. See generally C. Wilkinson, American Indians, Time and the Law, 19-23 (1967). It is, therefore, improbable that Congress even considered the impact of allotment and alienation on land acquisitions by Indian tribes.

> There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future.

Lummi, 5 F.3d. at 1360 (Beezer J., dissenting). The apparent simplicity offered by the Ninth Circuit's decision in reality offers nothing more than confusion and conflict. This Court should issue the writ of certiorari and resolve these conflicts in a manner consistent with the per se rule applicable to tribal-state taxation issues.

Respectfully submitted this 1st day of June, 1994

/s/
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APPENDIX A

LUMMI INDIAN BUSINESS COUNCIL
1503 E Street, P.O. Box 5746, Bellingham, WA 98227 (206)647-0234
DEPARTMENT Reservation Attorney EXT

May 25, 1994

Ms. Jeanne S. Whiteing
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, CO 80302

RE: Lummi Indian Tribe v. Whatcom County

Dear Ms. Whiteing:

In response to your letter of May 25, the Lummi Indian Tribe is pleased to consent to the filing of an amicus curiae brief by the Blackfeet Indian Tribe in support of the Lummi Tribe's Petition for Writ of Certiorari in the above-referenced case.

Very truly yours,

OFFICE OF THE RESERVATION ATTORNEY

By
HARRY L. JOHNSEN

HLJ:slw

cc: LIT

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